IN THE

# UNITED STATES CIRCUIT COURT OF APPEALS

NINTH CIRCUIT.

THE WILLIAMSBURGH CITY FIRE INSURANCE COMPANY (a corporation),
*Plaintiff in Error,*

vs.

LEON WILLARD, doing business under the firm name of LEON WILLARD & COMPANY,
*Defendant in Error.*

No. 1586.

## BRIEF ON BEHALF OF DEFENDANT IN ERROR.

CHARLES S. WHEELER,
J. F. BOWIE,
*Amici Curiæ.*

THE MURDOCK PRESS, 68 FREMONT ST., SAN FRANCISCO.

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## STATEMENT OF FACTS.

The principal question arising on this writ of error relates to the interpretation of certain clauses contained in a policy of insurance issued by The Williamsburgh City Fire Insurance Company. The provisions of the policy are as follows:*

"No. 2765082 $2,500

*THE WILLIAMSBURGH CITY FIRE INSURANCE COMPANY OF BROOKLYN, NEW YORK.*

*IN CONSIDERATION of the stipulations herein named and of Dollars Premium, does*

* In printing the policy we have endeavored to copy the type as well as the contents.

*insure Leon Willard & Company for the term of one year from the 29th day of September, 1905, at noon, to the 29th day of September, 1906, at noon, AGAINST ALL DIRECT LOSS OR DAMAGE BY FIRE, EXCEPT AS HEREINAFTER PROVIDED, to an amount not exceeding $2500 to the following described property while located and contained as described herein, and not elsewhere, to-wit:*

## *AS PER SLIP HERETO ATTACHED.*

$2500 On stock of Fancy goods, laces, cloaks, wraps and perfumery, and other similar merchandise, their own, or held by them in trust or on commission, or sold, but not delivered, all while contained in the brick building situate No. 738 North side of Mission Street, between Third and Fourth Streets, San Francisco, California.

It is understood that Leon Willard is the assured under this policy, doing business under the name of Leon Willard & Company.

This slip is hereby made a part of policy No. 2765082, issued to Leon Willard & Company by the Williamsburgh City Fire Insurance Company.

San Francisco, September 29th, 1905.

(Signed) EDWARD E. POTTER,
General Agent.

This company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the insured to repair or replace the same with material of like kind and quality; said ascertainment or estimate shall be made by the insured and this company or, if they differ, then by appraisers, as hereinafter provided; and, the amount of loss or damage having been thus determined, the sum for which this company is liable pursuant to this policy shall be payable sixty days after due notice, ascertainment, estimate, and satisfactory proof of the loss have been received by this company in accordance with the terms of this policy. It shall be optional, however, with this company to take all, or any part, of the articles at such ascertained or appraised value, and also to repair, rebuild, or replace the property lost or damaged with other of like kind and quality within a reasonable time on giving notice, within thirty days after the receipt of the proof herein required, of its intention so to do; but there can be no abandonment to this company of the property described.

This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss.

This entire policy, unless otherwise provided by agreement indorsed hereon, or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy; or if the

subject of insurance be a manufacturing establishment, and it be operated in whole or in part at night later than ten o'clock, or if it cease to be operated for more than ten consecutive days; or if the hazard be increased by any means within the control or knowledge of the insured; or if mechanics be employed in building, altering, or repairing the within described premises for more than fifteen days at any one time; or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple; or if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage; or if, with the knowledge of the insured, foreclosure proceedings be commenced or notice given of sale of any property covered by this policy by virtue of any mortgage or trust deed; or if any change, other than by the death of an insured, take place in the interest, title, or possession of the subject of insurance (except change of occupants without increase of hazard), whether by legal process or judgment or by voluntary act of the insured, or otherwise; or if this policy be assigned before a loss; or if illuminating gas or vapor be generated in the described building (or adjacent thereto), for use therein; or if (any usage or custom of trade or manufacture to the contrary, notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, dynamite, ether, fireworks, gasoline, greek fire, gunpowder exceeding twenty five pounds in quantity, naphtha, nitro-glycerine or other explosives, phosphorus, or petroleum, or any of its products of greater inflammability than kerosene oil of the United States standard (which last may be used for lights and kept for sale according to law, but in quantities not exceeding five barrels, provided it be drawn and lamps filled by daylight or at a distance not less than ten feet from artificial light); or if a building herein described, whether intended for occupancy by owner or tenant, be or become vacant or unoccupied, and so remain for ten days.

This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or for loss or damage occasioned by or through any volcano, earthquake or hurricane, or other eruption, convulsion, or disturbance; or by theft; or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire; or when the property is endangered by fire in neighboring premises; or (unless fire ensues, and, in that event, for the damage by fire only) by explosion of any kind, or lightning; but liability for direct damage by lightning may be assumed by specific agreement hereon.

If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease.

This company shall not be liable for loss to accounts, bills, currency, deeds, evidences of debt, money, notes, or securities; nor, unless liability is specifically assumed hereon, for loss to awnings, bullion, casts, curiosities, drawings, dies, implements, jewels, manuscripts, medals, models, patterns, pictures, scientific apparatus, signs, store or office furniture or fixtures, sculpture, tools, or property held on storage or for repairs; nor, beyond the actual value destroyed by fire, for loss occasioned by ordinance or law regulating construction or repair of buildings, or by interruption of business, manufacturing processes, or otherwise; nor for any greater proportion of the value of plate glass, frescoes, and decorations than that which this policy shall bear to the whole insurance on the building described.

If an application, survey, plan, or description of property be referred to in this policy, it shall be a part of this contract and a warranty by the insured.

In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company.

This policy may by a renewal be continued under the original stipulations, in consideration of premium for the renewed term, provided that any increase of hazard must be made known to this company at the time of renewal, or this policy shall be void.

This policy shall be cancelled at any time at the request of the insured; or by the company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice it shall retain only the *pro rata* premium.

If, with the consent of this company, an interest under this policy shall exist in favor of a mortgagee or of any person or corporation having an interest in the subject of insurance other than the interest of the insured as described herein, the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interest as shall be written upon, attached, or appended thereto.

If property covered by this policy is so endangered by fire as to require removal to a place of safety, and is so removed, that part of this policy in excess of its proportion of any loss and of the value of property remaining in the original location shall, for the ensuing five days only, cover the property so removed in the new location; if removed to more than one location, such excess of this policy shall cover therein for such five days in the proportion that the value in any one such new location bears to the value in all such new locations; but this company shall not, in any case of removal, whether to one or more locations, be liable beyond the proportion that the amount hereby insured shall bear to the total insurance on the whole property at the time of fire, whether the same cover in new location or not.

If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article, and the amount claimed thereon; and, within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof; and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described, and the several parts thereof were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify.

The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers,

or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representatives, and shall permit extracts and copies thereof to be made.

In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part, relating to the appraisal or to any examination herein provided for; and the loss shall not become payable until sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required.

This company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by and expense of removal from premises endangered by fire, than the amount hereby-insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property, and the extent of the application of the insurance under this policy or of the contribution to be made by this company in case of loss may be provided for by agreement or condition written hereon, or attached or appended hereto. Liability for reinsurance shall be as specifically agreed hereon.

If this company shall claim that the fire was caused by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the insured for the loss resulting therefrom, and such right shall be assigned to this company by the insured on receiving such payment.

No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire.

Wherever in this policy the word "insured" occurs, it shall be held to include the legal representative of the insured, and wherever the word "loss" occurs, it shall be deemed the equivalent of "loss or damage."

If this policy be made by a mutual or other company having special regulations lawfully applicable to its organization, membership, policies, or contracts of insurance, such regulations shall apply to and form a part of this policy as the same may be written or printed upon, attached, or appended hereto.

This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto, and as to such provisions and conditions no officer, agent, or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured, unless so written or attached.

In an action brought under this policy, counsel for insurer, in his opening statement, declared, in substance, that the defense of the company rested entirely upon the fact that the fire which destroyed the insured property originated on certain other property at some distance therefrom. That this fire would not have originated but for an earthquake which had theretofore taken place, and that the fire on this distant property was due to the action of the earthquake upon conditions existing at the time the same took place. For instance, we may assume that the vibration of the earthquake overthrew a lighted lamp, or dislodged from its receptacle a friendly fire, which in turn started a hostile fire, destroyed the premises on which it originated, and subsequently spread to and destroyed the property insured. Upon this statement the court instructed the jury to find for the insured. Thus, there is presented the following question: Does the policy above set forth cover the case of a loss by fire when the fire which caused the loss originated on premises other than those covered by the insurance policy, and subsequently spreads to and destroys the insured premises, if the origin of the fire can be traced to conditions created by the oscillating effect of an earthquake acting upon friendly fires existing at the time it took place, or so disturbing normal conditions that hostile fires arose as a result of the change created by the earthquake acting on normal conditions existing prior thereto? The insurer contends that the policy does not cover in such a case, as it contains the clause: "This company shall not

be liable . . . for loss or damage occasioned by or through . . . earthquake."

This case hinges upon the proper interpretation of this clause.

We, therefore, shall proceed to consider the meaning of the clause. For, after all is said and done, the entire question hinges upon the intention of the parties as expressed in the contract, and resolves itself to this: Does the declaration that the insurer against fire shall not be liable for loss occasioned by or through earthquake, clearly evidence an intention to exclude from the indemnity promised loss by fire if the fire which caused the loss was itself caused by a fire occasioned by earthquake at some considerable distance from the insured premises?

## ARGUMENT.

Sir George Jessel once said:

> "No judge objects more than I do to referring to authorities merely for the purpose of ascertaining the construction of a document. That is to say, I think it is the duty of the judge to ascertain the construction of an instrument before him, and not to refer to the construction put by another judge upon an instrument perhaps similar, but not the same. The only result of referring to authorities for that purpose is confusion and error, in this way, that if you look at a similar instrument and say that a certain construction was put upon it, and that it differs only to such a slight degree from the document before you, that you do not think the difference sufficient to alter the construction, you miss the real point of the case, which is to ascertain the meaning of the instrument before you. It may be quite true that in your opinion the difference between the two instruments is not sufficient to alter the construction, but at the same time the judge who decided on that other instrument may have

> thought that that very difference would be sufficient to alter the interpretation of that instrument. You have, in fact, no guide whatever; and the result, especially in some cases of wills, has been remarkable. There is, first, document A, and a judge formed an opinion as to its construction. Then came document B, and some other judge has said that it differs very little from document A,—not sufficiently to alter construction—therefore he construes it in the same way. Then comes document C, and the judge there compares it with document B, and says it differs very little and therefore he shall construe it in the same way. And so the construction has gone on until we find a document which is in totally different terms from the first, and which no human being would think of construing in the same manner, but which has, by this process, come to be construed in the same manner."
>
> *Aspden* v. *Seddon,* (1875), L. R. 10 Ch. 394, at p. 397, note (1).

This statement has been made by judge after judge. It is unquestionably correct, yet the habit of those practising under the common law system is to rely upon authority, and this habit is so strong that, as pointed out by the Master of Rolls, the purely illustrative value of cases interpreting written instruments has been too often disregarded and the decisions treated as declaring rules of law which are ultimately substituted for the rules of interpretation, of which the cases are professedly illustrative, but nothing more.

In this argument we shall endeavor not to lose sight of the rules of law or of the subordinate rules of interpretation. While many cases illustrating the application to insurance policies of rules of interpretation are cited, we desire to call to the attention of the court at the outset the fact that the question involved is abso-

lutely open in so far as authority is concerned, as the provision of the policy under consideration has never been interpreted in a similar insurance policy or in any other insurance policy.

It will scarcely be contended, even by our opponents, that it appears clearly from the language of the policy, without reference to rules of law and rules of interpretation, that the insurers are not liable in the event which has occurred. Indeed, an ordinarily intelligent layman, reading the policy, would naturally reach the conclusion that the statement that the company was not liable for loss occasioned by earthquake, hurricane, or theft, was a mere iteration of the fact that the insurance ran against loss by fire, not loss by the elements in general. It is clear that the language of the proviso refers to loss occasioned by or through earthquake, and not by loss *by fire* occasioned by or through earthquake, and the argument in favor of the insurer falls to the ground unless the words "by fire" be inserted by construction.

There are certain general principles of law which govern the construction of all written instruments and other rules of interpretation peculiar to policies of insurance. Of course, the purpose of general rules of interpretation is to ascertain the meaning of the instrument under consideration,—that is, the intention of the parties to the contract, as evidenced by the writing; for interpretation or construction deals only with the expressed intention,—that is, the meaning to be attributed to the words employed.

*Hunter* v. *Atty. Gen.,* L. R. App. Cas. 1899, 309.

> And "there is always some presumption in favor of the more simple and literal interpretation of the words of a statute or other written instrument." (Lord Selbourne, in *Col. Rail Co.* v. *North British Rail Co.,* 6 App. Cas. 121.)

We have already pointed out that the literal language of the clause under consideration consists in a mere declaration that the company shall not be liable for "loss or damage occasioned by or through earthquake." The clause does not purport to be inserted by way of exception, but its language is merely declaratory and is admirably calculated to be so understood by the average person who might happen to read it. But it is insisted that the phrase will be ineffective and meaningless and will not operate as in any manner limiting the liability of the company unless the words "by fire" be interpolated by construction. That such presumption as exists in favor of the more simple and literal meaning of the words employed must give way on this account. That as shown by the preceding provisions of the clause, it is not a mere declaratory clause but was intended to exempt the company from liability for loss by fire occasioned by earthquake and must be so construed.

In other words, it is argued that the literal declaratory language of the policy does not express the true intent. That a careful reading of the policy and judicial decisions shows that there is an ellipsis between the words "loss" and "occasioned," and that this ellipsis must be supplied so as to limit the liability of the company.

If there in fact be an ellipsis, this is due to the act of the insurer, and we contend that—

IN CONSTRUING A POLICY OF INSURANCE IN WHICH AN ELLIPSIS OCCURS, THE ELLIPSIS CANNOT BE SUPPLIED IN SUCH A MANNER AS TO EXCLUDE RISKS WHICH THE INSURED WOULD NOT HAVE UNDERSTOOD TO BE EXCLUDED FROM A READING OF THE POLICY ITSELF. A CLAUSE IN AN INSURANCE POLICY DECLARATORY IN FORM, THOUGH INTENDED TO EXPRESS A LIMITATION OR EXCEPTION, WILL NOT BE CONSTRUED IN ACCORDANCE WITH SUCH INTENT UNLESS THE INSURED COULD NOT HAVE BEEN MISLED BY THE DECLARATORY AND ELLIPTICAL METHOD OF EXPRESSION.

In preparing contracts and other written instruments, lawyers occasionally endeavor to avoid expressions which would invite opposition, and yet to so draw the instrument that by process of legal construction, the result will not differ from that which would have followed had the intent been clearly expressed. The wish, as Governeur Morris is reported to have said, is "to make the instrument as palatable as possible." This temptation is particularly strong with those framing contracts such as that of insurance, and its result is admirably illustrated in this city where some insurance companies sold policies such as that under discussion, without the insured understanding that the company did not intend to insure against risk of fire which had originated in earthquake either on the premises insured, or other premises. Indeed, such policies were sold for the same price and in open competition with policies as to which no such contention could possibly be advanced, and if this be the true intent and interpretation, these

policies have been so skillfully drawn that those purchasing them have been completely deceived. To the lay mind the policies were thoroughly palatable. But it is now contended that in judicial construction the literal meaning of the language will be ignored, that the declaratory form of expression will be disregarded and the clause construed as creating a limitation or exception, and once the fact that an ellipsis exists is made apparent, the only question then is, what words shall be inserted to supply the ellipsis? That for this purpose, the words "by fire" must be inserted between the words "loss" and "occasioned."

We contend that both the premises and conclusion are false.

The general rule outlining the form in which insurance policies must be framed was very clearly stated by Lord St. Leonards, in *Anderson* v. *Fitzgerald,* 4 H. L. C. 484, where he said (p. 510).

> "I must say that that very difference of opinion between such very learned persons upon such an important case as this, of itself shows the improper manner in which this policy has been framed. A policy ought to be so framed, that he who runs can read. It ought to be framed with such deliberate care, that no form of expression by which, on the one hand, the party assured can be caught, or by which, on the other, the company can be cheated, shall be found upon the face of it; nothing ought to be wanting in it, the absence of which may lead to such results. When you consider that such contracts as this are often entered into with men in humble conditions of life, who can but ill understand them, it is clear that they ought not to be framed in a manner to perplex the judgment of the first Judges in the land, and to lead to such serious differences of opinion among them. . . .

"I think that your Lordships, and every Court of Justice, should endeavor to give such a construction to a policy of this nature as will afford a fair security to the person with whom the policy is made, that, upon the ordinary construction of language, he is safe in the policy which he has accepted. I am quite sure if policies of this nature are to be entered into, and such doubts are to be raised as have been raised in this case, that that very important branch of insurance, life-insurance, will become very distasteful to people, and that no prudent man will effect a policy of insurance with any company without having an attorney at his elbow to tell him what the true construction of the document is. And, indeed, in this case it has been necessary to consult all the Judges in Ireland, and they, having decided in one way upon the language of the policy, the Judges of England have been consulted, and they have come to a different opinion." (p. 513.)

In *Thompson* v. *Weems,* 9 App. Cas. 671, 682, Lord Blackburn, referring to the opinion of Lord St. Leonards, said:

"In *Anderson* v. *Fitzgerald,* Lord St. Leonards points out very strongly that . . . it is necessary to see that the language is such as to show *that the insured as well as the insurer meant it,* and that the language in the policy being that of the insurers, if there is any ambiguity, it must be construed most strongly against them."

In *Liverpool etc. Ins. Co.* v. *Kearney,* 180 U. S. 132, the Court said (p. 136):

"In the case of contracts of insurance, namely, that where a policy of insurance is so framed as to leave room for two constructions, the words used should be interpreted most strongly against the insurer. This exception rests upon the ground that the company's attorneys, officers, or agents prepared the policy, and it is its language that must be interpreted. *National Bank* v. *Insurance Co.,* 95 U. S. 673, 678-9; *Mouler* v. *American Life Ins. Co.,* 111 U. S. 335, 341."

In *Boone* v. *Aetna Ins. Co.*, 40 Conn. 586, the court said:

> "It is a familiar rule in the construction of provisos and exceptions of this sort, made in qualification of the general positive agreement, that words susceptible of either construction should be taken most strongly against the speaker or party whose language is to be interpreted; and that the general and positive agreement should have effect unless the exception clearly withdraws the case from its operation. This has especial force when the other considerations pertaining to the subject tend to the same result.
>
> *"To this should be added, that it is the duty of an insurance company seeking to limit the operation of its contract of insurance by special provisos or exceptions, to make such limitations in clear terms and not leave the insured in a condition to be misled.* The uncertainties arising from provisos, exceptions, qualifications, and special conditions in or endorsed upon policies, have been often condemned and such special modifications are justly characterized as traps to deceive and catch the unwary. An insured may reasonably be held entitled to rely on a construction favorable to himself where the terms will rationally permit it."

In *Amer. Cred. Indemnity Co.* v. *Wood*, 73 Fed. 81, the Court of Appeals for the Second Circuit said (p. 88):

> "If, by the introduction of a subsequent and obscure clause, difficult to understand, or requiring expert knowledge for its comprehension, the preceding clauses, plainly and unequivocally expressed, by which the initial loss of the indemnified is fixed, are nullified, the subsequent clause must be ignored. It cannot be permitted to operate as a snare to the unwary."

In *Wausau Telephone Co.* v. *United Firemen's Ins. Co.*, 101 N. W. 1100, the Court says:

> "Each policy contained this clause in addition to the clauses of the standard policy: 'This insurance does not

cover any loss or damage to property caused by electric current, whether artificial or natural.' There was no dispute as to the origin of the fire or the amount of the loss. A wire conveying an electric light current became crossed with one of the plaintiff's telephone wires at a point half a mile distant from the exchange, and the electric light current was carried into the exchange, setting fire to the insulating wrappers and the wooden frame of the switchboard, thus causing the loss by fire. . . .

"The main purpose of fire insurance, at least so far as the insured is concerned, is to protect against damage resulting from fire. The standard policy, which is also a statute, provides in its opening clause that the insurance company 'does insure . . . against all direct loss or damage by fire except as hereinafter provided.' . . .

*"If it were to be conceded that a fire resulting from an artificial current could be excepted, we should still be of the opinion that the exception should not be held to refer to the loss by fire. The undoubted purpose of the policy being to indemnify against the loss by fire, an exception to liability for such a loss should be plainly expressed."*

In *Wallace* v. *Ins. Co.*, 41 Fed. 742, the Court said (p. 744):

"A contract drawn by one party, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary; and if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured. *As the insurance company prepares the contract, and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the burdens and duties thereby imposed upon him.* Wood, Ins., 140, 141, and cases cited."

The foregoing authorities sufficiently illustrate the rule that stipulations limiting the liability of the insurer must be clearly and unequivocally expressed, so that he who runs may read. That a stipulation embodied in a policy will not be interpreted as an exception or limitation exempting the companies from liability assumed unless such stipulations are so worded that the insured not skilled in law would, upon reading the policy, understand that such was their effect. This is a rule of law, not a mere rule of interpretation.

It is clear, and has been demonstrated by the recent conflagration in this city, that the clause now before the Court was not so drawn as to apprise the insured that a loss such as that at bar was not insured against.

It is conceded that such is not the literal meaning of the words employed in the clause, and the contention of the insurer is that there is an ellipsis in the policy which they would have the Court supply by words which will result in exempting them from liability.

We respectfully submit that this clause of the policy, couched in a declaratory form, is so drawn that the insured would not understand that any ellipsis existed. That the insured would not, on reading the policy, understand that there was any intention to exclude from the operation of the indemnity a loss of the character which has occurred. That such is not the literal meaning of the words used, and the declaratory form of expression employed conceals the existence of the ellipsis claimed to exist. That if, in fact, it was the intention of the insurer to exempt itself from liability in the event which has occurred, such intention has not

been definitely or sufficiently expressed to apprise the insured of this fact, and therefore cannot be effected.

A case which well illustrates the application of these rules to the case at bar, and shows the true interpretation of the policy, is that of *Winspear* v. *Accident Co.*, decided by the Court of Appeal, Exchequer Div., and reported in Volume 6 Q. B. D. 42. An action was brought on a policy of accident insurance, by the terms of which—

> "The defendants agreed to pay the amount insured to W's legal representatives, should he sustain 'any personal injury caused by accidental, external, and visible means,' and the direct effect of such injury should occasion his death. The policy also contained a proviso that the insurance should not extend 'to any injury caused by or arising from natural disease or weakness or exhaustion consequent upon disease.' . . .
>
> "During the time this policy was in force, viz.: On the 26th of May, 1879, the insured, whilst crossing and fording a stream or brook called the river Rea, in Edgbaston, Birmingham, was seized with an epileptic fit, and whilst in such fit fell down in the stream, and was drowned. The insured did not sustain any personal injury to occasion death other than drowning." (p. 43.)

The Court said, speaking by Lord Coleridge, C. J., (pp. 44, 45):

> "I am of opinion that this judgment should be affirmed, and that on very plain grounds. It appears to be clear from the statement in this case, that the insured died from drowning in the waters of the brook whilst in an epileptic fit, and drowning has been decided to be an injury caused in the words of this policy 'by accidental, external, and visible means'. I am therefore of opinion that the injury from which he died was a risk covered by this policy, and the only question then remaining is whether the case is within

> the proviso which provides that the insurance 'shall not extend to death by suicide, whether felonious or otherwise, or to any injury caused by or arising from natural disease, or weakness or exhaustion consequent upon disease.' It is certainly not within the first part of this proviso, because the death was not so occasioned, neither does it appear to me that the cause of the death was within those latter words of the proviso. The death was not caused by any natural disease or weakness or exhaustion consequent upon disease, but by the accident of drowning. I am of opinion that those words in the proviso mean what they say, and that they point to an injury caused by natural disease, as if for instance in the present case, epilepsy had really been the cause of the death. The death, however, did not arise from any such cause, and those words have no application to the case, and therefore the judgment of the Exchequer Division must be affirmed."

This decision has been followed in England, and also by the United States Circuit Court of Appeals of the Sixth Circuit, and has met with the approval of the United States Supreme Court.

In *Mfr.'s Ind. Co.* v. *Dorgan,* 58 Fed. 945, an action was brought on a policy of accident insurance. It was contended that, while suffering from an attack of heart disease, the insured fell into a stream in which he was fishing and was drowned. The Court assumed that the fall was due to weakness of the heart and proceeded on this assumption to construe the policy. The provisions of the policy are sufficiently stated in the opinion of the Court, delivered by Judge Taft, where is was said (p. 954):

> "The policy provided, as we have already seen, that the benefits under it extended to the death of the insured through external, violent, and accidental means, and that it should not cover accidental injuries or death resulting

from or caused, directly or indirectly, wholly or in part, by or in consequence of fits, vertigo, somnambulism, or any disease existing prior or subsequent to the date of the certificate, or to any cause excepting where the injury was the sole cause of the disability or death. In the application the deceased stated that he was aware that the insurance would not extend to 'any bodily injury happening, directly or indirectly, in consequence of disease, or to death or disability caused wholly or in part by bodily infirmities or disease, or to any case where the accidental injury was not the proximate and sole cause of disability or death.'

"It is well settled that an involuntary death by drowning is a death by external, violent, and accidental means. *Trew* v. *Assurance Co.,* 6 Hurl. & N. 838; *Winspear* v. *Ins. Co.,* 6 Q. B. Div. 42; *Reynolds* v. *Insurance Co., 22* Law T. (N. S.) 820.

"We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning in such case would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. *The disease would be but the condition; the drowning would be the moving, sole, and proximate cause.*

"In *Winspear* v. *Ins. Co.,* 6 Q. B. Div. 42, the terms of the policy provided 'that it should cover any personal injury caused by accidental, external, and visible means, if the direct effect of such injury should occasion his death; and it provided further, that it should not extend to any injury caused by or arising from natural disease or weakness, or exhaustion consequent upon disease.' The insured was seized with an epileptic fit and fell into a stream, and was there drowned while suffering from a fit. It was held that the death was within the risk covered by the policy, and that the proviso did not apply.

"In *Lawrence* v. *Insurance Co.,* 7 Q. B. Div. 216, the policy provided: 'This policy covers injuries accidentally occurring from material and external cause operating upon the

person of the insured, where such accidental injury is the direct and sole cause of the death to the insured, but it does not insure in case of death arising from fits, . . . or any disease whatsoever, arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly, or jointly with such accidental injury.'

"The insured, while at a railway station, was seized with a fit, and fell forward off the platform across the railway, when an engine and carriages which were passing went over his body, and killed him. It was held that 'the death of the insured was caused by an accident, within the meaning of the policy, and that the insurers were liable.'

"Mr. Justice Watkin Williams said in this case (p. 955): 'The true meaning of this proviso is that, if the death arose from a fit, the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning, in my opinion, of this proviso. But it is essential to that construction that it should be made out that the fit was a cause, in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so because you can show that another cause intervened and assisted in the causation.'

"After giving some illustrations, the learned justice continued: 'I therefore put my decision on the broad ground that, according to the true construction of this policy, and this proviso, this was not an act arising from a fit, and therefore whether it contributed directly or indirectly, or by any other mode, to the happening of the subsequent accident, seems to me wholly immaterial, and the judgment of the court ought to be in favor of the plaintiff.'

"These cases are referred to with approval by Mr. Justice Gray in delivering the opinion of the Supreme Court in case of *Insurance Co.* v. *Crandal,* 120 U. S. 527-532, 7 Sup. Ct. 685. They sufficiently establish the proposition that, if the deceased in this case died by drowning, then drowning was in law the sole and proximate cause of the disability or death.

"We now proceed to inquire whether, if the fall of the deceased into the water was caused by fits, vertigo, or any

> disease, such accidental death could be said, within the meaning of the policy, to have been 'caused directly or indirectly, wholly or in part, by or in consequence of such fits, vertigo, or disease.' In our opinion the adjective 'accidental' qualifies not only 'injuries,' but also 'death,' and therefore an accidental death by drowning does result from, *and is caused* INDIRECTLY *by, fits, vertigo, or other disease, if the fall into the water, from which drowning ensues, is caused by such disease.* The exception is broader than the exceptions in the policies considered in the Winspear and the Lawrence cases, and is made so by the use of the word 'indirectly.' As can be seen from the words of Mr. Justice Williams quoted above in the Lawrence Case, if that policy had provided that it should not apply to an accident to which a fit contributed indirectly, the company would not, in his opinion, have been liable."

These cases illustrate admirably the distinction between the policy at bar and the policies issued by certain other companies in which the phrase 'directly or indirectly' is used as qualifying loss by earthquake.

There are two decisions—one by the Supreme Court of Illinois, the other by the Supreme Court of Pennsylvania, dealing with policies of fire insurance, which illustrate admirably the question just discussed, and also the question next in order of discussion.

In the case of *Commercial Ins Co.* v. *Robinson,* 64 Ill. 265, the facts are stated in the opinion, which is as follows:

> "The policy in this case provided that the company should not be liable 'for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; . . . nor for any loss caused by the explosion of gunpowder, camphene or any explosive substance, or explosion of any kind.'

"The main question is as to the construction to be given to this last clause. It is contended by counsel for the company that it protects the company from liability for any loss by fire where the fire has been produced by an explosion. It is insisted on the other hand, by counsel for the appellee, that the clause protects the company only against losses occasioned directly by an explosion, and not against losses from fire where the fire has been caused by an explosion.

"Let us remark, in the first place, that equivocal expressions in a policy of insurance, whereby it is sought to narrow the range of the obligations these companies profess to assume, are to be interpreted most strongly against the company. *Aurora Fire Ins. Co.* v. *Eddy,* 49 Ill. 106. The companies have the preparation of their own policies, the choice of language in which to express their obligations, and they show a studious solicitude to limit their liability. Their policies are prolix with provisions of this character, and the public must accept them or go without insurance. We have no right to censure the companies for this, and do not, but the reading of a policy furnishes sufficient reason for the rule of interpretation formerly laid down by this court.

"It will be observed that, in a clause of the policy preceding the one under consideration, the company stipulated that it should not be liable 'for any loss or damage *by fire* caused by means of an invasion, insurrection,' etc. Here exemption is specially secured against liability for losses *by fire* caused in a certain manner. But the clause under consideration leaves out the words 'by fire.' It secures exemption from liability for losses caused by explosion, but not from liability for losses *by fire* caused by explosion. The difference in phraseology betwen the two clauses is so marked, that, when we consider their connection with each other, we cannot resist the conclusion that the difference was intended.

"Whether the difference was intended or not, cannot be certainly ascertained, but it is reasonable to resolve the doubt against the company. The object of the company's existence is to insure against fire. That is what it holds itself out to the public as able and willing to do. When a person takes out a policy, and pays his premium, he takes

it for granted, without reading his policy, that he cannot be permitted to make the risk more hazardous to the company by storing highly inflammable materials upon his premises. He knows that would be acting in bad faith with the company, and that the policy has probably provided against it. But, he would have no reason to suppose that, among the voluminous stipulations of the policy, there would be found one intended to deprive him of its benefit because a fire, which has destroyed his property, originated in another house a half mile distant, in the explosion of a camphene lamp. Most fires originate in acts of carelessness, and it is chiefly to guard themselves against the carelessness of others that prudent persons insure. Yet the construction of this policy contended for by the company would make the assured assume the liability for the carelessness of others. He is thus deprived of the very protection he seeks by his insurance if, when his house burns up, he can be denied the payment of his policy because the fire was caused by an explosion upon the premises of others. The great fire of Chicago is supposed to have originated in the overturning and explosion of a lamp, but we are not aware that any of the insurance companies that suffered by that fire have sought to interpose this defense, although this clause is a very common one in insurance policies, and was probably contained in many that had been issued on the property then destroyed.

"Counsel for the company, feeling the unreasonable character of this condition, with their interpretation, in cases where the fire comes from an explosion on other premises, speak of it as if it referred only to explosions on the premises of the assured. But the policy will bear no such construction or limitation. We must either hold that the clause refers to loss by explosions simply, without reference to fire, or to losses by fire caused by explosion anywhere, whether on or remote from the premises. There is no middle term. It must receive one of these constructions or the other. One is consistent with the context, reasonable in itself, and just to both parties. The other requires the interpolation of two additional words in the policy, is inconsistent with the context, and in a large degree would

make fire insurance a mere mockery. We cannot hesitate which construction to choose.

"But, say the counsel for appellant, this company does not profess to insure against losses by explosion, but only by fire, and the clause, construed as we construe it, is unmeaning or at least useless. But not so. The clause was designed to apply to all cases where the explosion was the immediate cause of the loss. Suppose fire is carelessly applied to powder or other explosive substance. An explosion follows which rends furniture and building. This explosion is the result of the ignition of the explosive material, and it might be claimed that the loss caused thereby was a loss caused by fire. The courts might not so hold, independently of the clause in the policy, but we can well understand, when we examine these policies, that the insurers may have introduced this clause for the purpose of leaving no room for argument or doubt. Again, suppose a case where a fire is speedily subdued, but before it is, it has ignited powder, and an explosion has taken place which has caused much damage but has not extended the fire. In such a case, the company would claim they were protected by this clause from the liability for the consequences of the explosion.

"It is not necessary, however, for us to show how the clause was designed to operate. It is sufficient to say that in our judgment, it cannot receive the construction claimed by the company."

In *Heffron* v. *Kittanning Ins. Co.,* 20 Atl. 698, the facts are stated in the opinion, which was as follows:

"Assuming that the evidence shows, and that the referee should have so found, that the fire occurred from the explosion of a lamp, is this within the exceptions made in the eighth clause of the policy? This clause is a limitation upon the general liability and undertaking of the company, and its terms are to be construed most favorably to the assured. If there is any lack of clearness the court certainly will not strain at a construction, which will relieve the company, but a doubt, if any, will be resolved in favor of the assured. *Insurance Co.* v. *Mund,* 102 Pa. St. 89; *Allemania Fire Ins.*

*Co.* v. *Pitts, etc. Soc.*, 11 Atl. Rep. 572. The clause in question reads as follows: 'This company shall not be liable for loss in case of fire happening by any insurrection, invasion, foreign enemy, civil commotion, mob, riot, or any military or usurped power; nor explosions of any kind whatever within the premises, nor by concussions merely; nor when the fire is caused by the fall of a building, or any part thereof, (except such falling be the result of a fire); nor, when fire heat is used in any process, to the articles damaged by such process; nor for any damage by heat within the premises without combustion; nor if the assured shall keep or use, or permit to be kept or used, on the premises, gunpowder, fire-works, nitro-glycerine, dynamite, . . . or volatile oils, without written consent in this policy.' The whole clause, as will be seen, is divided into different sections, each covering excepted risks of different character. They are all sufficiently defined, except the second, which is made ambiguous by the absence of any governing words before the word 'explosion.' Something must in any event be supplied, and the controversy is as to what this shall be. The company claim to have a part of the first section repeated, and read into the second, so that it shall read 'nor for loss in case of fire happening by explosions of any kind whatever within the premises.' The plaintiff contends that the simple insertion of the word 'by' before the word 'explosions' is all that is warranted. In the one case the defendants are exempted from liability for this loss; in the other it falls within the limit of their responsibility. If either of these constructions is equally sustained by the context, that must be taken which is the most favorable to the assured. A careful examination of the question convinces me that the exception covered by this section is to be restricted to losses arising from explosions, rather than extended to the much broader ground of losses by fire originating from explosions. The former is not only equally as well sustained by the context, but even better than the other. It is evident that for complete sense the introductory words of the clause must be repeated with each section. These introductory words stop with the word 'loss.' This company shall not be liable for loss in case of fire happening by any insurrection, etc. This company shall not be

liable for loss by explosions, nor by concussions merely. This company shall not be liable for loss when the fire is caused by the fall of a building. This company shall not be liable for loss where fire heat is used in any process, to the article damaged by such process. This company shall not be liable for any damage by heat within the premises without combustion. This company shall not be liable for loss, if the assured keep or use on the premises gunpowder, etc. Each section of the whole clause is thus set in the same frame, and it is made harmonious in construction throughout; and, not only is this the correct grammar of the clause,—a not always potent argument in the law—but, to my mind, it conveys the actual sense of it. There is nothing in the clause itself, nor in the supposed purpose for which it was introduced into the policy, which leads to a different result. It cannot be urged that the excepted losses mentioned in this clause are those of fire alone. It is true that this is the case in all the sections other than the one in question, but in this one we clearly have the exception of losses by concussion merely, and losses by explosions within the premises are not out of place in connection therewith. Indeed, damage by these two instrumentalities are so quite alike that the two are very naturally associated together, and may well appear in conjunction with each other, in the midst of excepted losses by fire. Nor are losses by explosion foreign to the risks assumed by insurance against fire. They are like the damages by smoke and water, losses by theft, destruction by the falling of buildings, or injury by fire agencies without actual ignition, all of which are to be found among the losses excepted against in clauses in policies of insurance, similar to the one under consideration. Losses by explosions, as by concussions merely, which we find joined together in this policy, are thus proper subjects of exception from the general liability assumed thereby and there is nothing that requires us to hold that more than this was intended to be covered. Each case of this character must be determined upon its own facts, and as no two policies are exactly alike, so there is like assistance to be derived from the authority of decided cases. But the nearest which I find to the case in hand is the case of *Insurance Co.*

v. *Robinson*, 64 Ill. 265. The policy there provided that the company should not be liable 'for any loss or damage by fire caused by means of an invasion; . . . nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosions of any kind.' It was contended that the words 'explosions of any kind' protected the company from liability for loss by fire when the fire had been produced by an explosion; but the court held that it merely secured exemption from liability for losses caused by explosions, and not from liability for losses by fire caused by an explosion. The case may well be consulted at length for a full discussion of this question. The case of *Insurance Co.* v. *Parker*, 23 Ohio St. 85, also bears somewhat closely upon the present case. The clause of exemption there was as follows: 'This company will not be liable for damage to the property by lightning aside from fire, nor for any loss or damage by fire happening by means of any invasion, etc., nor for damage occasioned by the explosion of a steam boiler, nor for damage resulting from such explosion, nor explosions caused by gunpowder, gas, or other explosive substances.' It was held that this clause did not exempt the company from damage by fire resulting from an explosion of gas. This decision is of peculiar interest and importance, because at the same term the case of *Insurance Co.* v. *Foote*, 22 Ohio St. 344, was also decided, a case which is much relied upon as materially extending the exemption of insurance companies from liability in cases of explosion. The two decisions by the same court at the same term were certainly not intended to be conflicting. The one, therefore, furnishes a check upon carrying the doctrine of the other too far, and, as thus qualified, the latter is not to be regarded as against the conclusions reached in the present case. From these considerations, I am satisfied that the referee has properly construed the contract of insurance between these parties, and that there is nothing in the fact that the fire originated in the explosion of a lamp, to prevent the plaintiff's recovery."

The preceding decisions show clearly that if an ellipsis occurs in a policy, and the fact that the ellipsis

does exist is not apparent to the insured, the ellipsis cannot be supplied by the court. In advancing the foregoing argument, we are fully aware that in the standard form of policy prescribed by several states including New York, Connecticut, New Jersey, Rhode Island, and others, an ellipsis occurs between the words "loss" and "caused" in the first part of the paragraph which refers to invasions, riots, etc.; that the language of the clause is couched in the same declaratory form here employed, and that the courts have construed the policy as creating an exception, and have, in certain cases, inserted the words "by fire" before the word "caused".

Whereas in Massachusetts, Minnesota, New Hampshire, and some other states, the provisos are drawn so as to expressly negative liability for loss by fire originating from riot, invasion, etc., and the phrasing of the policy is such that the insured is in no manner misled as to the extent of the protection afforded.

It now becomes necessary to consider these authorities, as it will undoubtedly be claimed that they are of controlling force in the case at bar.

It has been frequently said that the rules for the construction of a policy of insurance issued pursuant to a statute prescribing a standard form of policy, are no different from those applicable to policies issued in States where no form is prescribed. This statement, though true in some respects, is subject to certain obvious limitations, and it is clear that the question of whether the language of a policy drawn pursuant to a statutory form is sufficient in law to apprise the in-

sured of an intent which may be found therein, though the same be more or less obscure, is not a question which can be considered open to discussion, for that form of language which is authorized and prescribed by statute cannot be considered as insufficient in law.

It is also clear that in construing a clause in a policy prescribed by statute, the intendment is that each clause is to be given a definite effect, and no clause is to be treated as a mere repetition of a preceding provision. This intendment is usually indulged in dealing with ordinary contracts, but where each syllable of the contract is prescribed by statute, the force of the intendment is greatly increased. Indeed, in construing policies issued pursuant to the standard form, the courts are in fact construing the statute in spite of anything they may say to the contrary.

It is obvious that decisions of this character are inapplicable to the question heretofore discussed, viz.: The sufficiency of the language of the policy to advise the insured of the fact that the insurance did not cover the loss which has occurred, admitting for the sake of argument that such was the intention of the insurer, and that such intention could be discovered and enforced by the rules of construction.

We are now contending for one proposition only, viz.:

That the language of the policy is not such as to inform the insured that the insurer did intend to except the loss which has occurred from the provisions for indemnity. Such is not the literal meaning of the words employed, and the presumption in favor of the literal

meaning of the language used will not give way to the presumption in favor of an intention to give to each clause an operative effect where the declaratory form of expression was calculated to, and did, conceal from the insured the meaning and intention of the insurer.

But, conceding for sake of argument, that such is not the law, and conceding that it is incumbent upon the Court to give operative effect to every clause in the policy, no matter what studious care be employed to conceal the intention by ellipsis and misleading form of expression. If this all be done, and the policy construed in the light of all the decisions dealing with the contract of insurance, it will appear that the policy does not except loss by fire occasioned by earthquake, but does except loss which may be occasioned directly by the oscillation of an earthquake, and yet, under certain circumstances, constitute a fire loss, just as the policy excepts loss by theft or hurricane. Direct loss or damage by theft, hurricane, and earthquake consequent upon a fire are considered as loss or damage due proximately to fire, and such is the loss to which the proviso applies.

CONCEDING THAT THE PROVISION THAT "THE COMPANY SHALL NOT BE LIABLE FOR LOSS OR DAMAGE OCCASIONED BY OR THROUGH . . . EARTHQUAKE" MUST BE CONSTRUED AS LIMITING THE LIABILITY ASSUMED BY THE INSURER UNDER THE PRECEDING PROVISIONS OF THE POLICY AND INTERPRETING THE POLICY IN THE LIGHT OF THE ENTIRE RISK ASSUMED, AND THE DECISIONS DEALING WITH THE INTERPRETATION OF LIMITATIONS AMONG WHICH THE PHRASE TO BE CONSTRUED IS FOUND, THE INSURER IS NEVERTHELESS LIABLE IN THE EVENT WHICH HAS OCCURRED.

The argument in favor of the insurance company is based upon the following premises:

(*a*) The operative words of the policy of insurance by which the liability of the insured is to be measured, cover only direct loss or damage by fire.

(*b*) Loss or damage by earthquake is not insured against.

(*c*) In construing the policy, the Court must give a meaning which will be operative to every part of the policy where the words employed are under the ordinary rules of construction susceptible of being construed, so as to give to them an operative effect. And the conclusion which they draw from the premises is this:

Fire, being the only peril insured against, earthquake is not a peril insured against, so it is necessary to depart from the literal meaning of the phrase employed and disregard the form of expression in order to give the clause operative effect.

This can only be done by interpolating the words "by fire" between the words "loss or damage" and the word

"occasioned." And courts may supply these words without going beyond the legal limits imposed upon rules of construction.

In support of this argument, cases may be cited dealing with the construction of the paragraph by which it is provided that the insurer shall not be liable for loss or damage caused directly or indirectly by "riot," "civil war or commotion," "military or usurped authority."

The majority of these cases deal with standard form policies, but, conceding that this affords no rational ground of distinction, it will be found upon examination of these authorities that they are, by their own terms, inapplicable to the case at bar. However, to give these authorities full weight, as establishing the proper interpretation of the clause preceding that which relates to hurricane and earthquake, we will assume that the policy reads as follows:

> "This company shall not be liable for loss *by fire* caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power, or by order of any civil authority; or for loss or damage occasioned by or through any volcano, earthquake, or hurricane, or other eruption, convulsion or disturbance."

But, recognizing and supplying the first ellipsis claimed to exist in the policy in accordance with the decisions on which our opponents rely, we do not rid ourselves of the question of construction still remaining, viz.: The question of supplying words qualifying the loss occasioned by earthquake, hurricane, theft, etc.

Our opponents say that the words "by fire" should again be read into this clause, and rely upon the au-

thorities relative to riot, etc., as sustaining this contention. It may be admitted that if there be no inherent difference between earthquake and riot, etc., as a cause for loss for which the insurer would be liable under the terms of the policy,—that is, if earthquake could only cause a loss for which the insurer would be liable by first causing a fire which should itself be the immediate cause of the loss, as has been universally assumed to be the case with riot, civil war, etc., it would, in the absence of other distinguishing features, be very difficult to avoid the force of this argument, though, in matters of construction, arguments by analogy are really misleading. But "in ascertaining the meaning of a sentence reference is not always to be made to the next antecedent, or the next subsequent, but regard is to be had to the subject matter." (*Nettleton* v. *Billings,* 13 N. H. 446.) And there is an essential and fundamental difference between earthquake and hurricane on the one side, and riot and civil war on the other, as causes of fire loss. Earthquake or hurricane may be the direct cause of a loss which is viewed in law as the proximate result of a fire. That is, earthquake and hurricane, succeeding a fire, may cause a loss which will be a fire loss, without in any way contributing to or causing a fire. This is not true of riot, civil war, etc., and this very fact forms the admitted basis upon which the decisions relating to these matters rest. It is well settled that a policy of insurance, such as that at bar, covers all direct loss to the owner on account of injury or damage to the insured property proximately caused by fire.

Thus, there is included damage by water used to extinguish the fire, damage by breakage due to the ordinary acts of those extinguishing the fire, damage by theft where the fire created the opportunity for theft, and damage by the elements consequent upon a fire where the occasion for such damage was created by the preceding fire. Direct loss thus occasioned by means other than fire, but which, in law, is regarded as proximately caused by fire, is covered by the policy of insurance, as well as loss caused immediately by the fire itself.

Thus, where a building is gutted, but not totally destroyed by fire, and is blown down by a hurricane and complete demolition thus accomplished, the insurer against fire is liable for the damage caused immediately by the hurricane, if the building would have withstood the same had it not been for the injuries due to the fire which preceded the hurricane. Indeed, it has been held that if a building is partially destroyed by fire, and after the fire is extinguished a high wind blows over one of the standing walls of the burned building, causing it to fall upon and injure adjoining property, and this would not have occurred had it not been for the destruction by fire of the lateral support given to the wall, the loss sustained by the owner of the adjoining property, due immediately to the fall of the wall which was in turn due immediately to wind pressure, but proximately to the prior fire, is a fire loss, and a recovery therefor may be had upon a policy insuring against direct loss by fire.

See *Russell* v. *German Ins. Co.,* 111 N. W. 400.

In this case, the Court said (p. 403):

"'It may be generally stated that the loss in insurance cases must be proximately caused by a peril insured against, and that the contract does not contemplate an indemnity to the assured where the peril is the remote cause of loss.' In discussing the liability to misapply the maxim, Mr. Phillips (Phillips on Insurance, Sec. 1132) observes: 'In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster.' Again: 'In every insurance, the risk on each peril is liable to be affected by every other peril; and the party, whether insurer or assured, at whose risk a peril is, must bear the loss by such peril, though it may have been indirectly and incidentally enhanced by another, for which he is not answerable, where there is no express or implied stipulation, obligation, or condition against the subject being exposed to such other peril; but, where the loss is by a risk insured against that is enhanced by a peril to which the subject is exposed in violation of the express or implied stipulations of the parties, the underwriter is not liable for it.' Section 1134." . . .

"A case almost directly in point is that of *Johnston* v. *West of Scotland Ins. Co.*, 7 Court of Sessions Cases, 52, where a house covered by a policy of insurance from damage by fire had been injured by the falling of a gable of another house in consequence of fire in that house, and it was held that the company was liable, although the house insured had not been on fire, and the gable of the other house had stood two days after the fire was extinguished, and fell in the course of taking the house down." (P. 404.) . . .

"The inquiry resolves itself to determining whether or not the wind was an incident in the chain of events, or the primary cause. If, at the time the contract was entered into, windstorms of the character which arose on the night of December 13th were liable to occur at any time, then the parties contracted with reference to such a possibility. If they could reasonably have foreseen that a fire might leave the wall, 69 feet high and 157 feet long, exposed to winds likely to occur, and that such a wind might blow it down,

then such contingency was an element in the risk. The mere fact that the wall stood for the period of several days is not important, provided the wall was not subjected to such a test as occurred on the seventh day. The same inquiry now calling for solution would present itself had the wind come up one, two, or three days after the 13th. The question is not alone, how much was the standing wall weakened by the fire? but, rather, did the fire leave the wall in such an exposed condition that the wind produced an effect which would not have been produced except for the fire? The attention of all the experts who testified was carefully drawn to the condition of the wall as it stood after the fire, and we must accept their conclusions that it was safe for the purpose of rebuilding, and that it was not materially damaged for such purpose by the scaling of the bricks by the heat, or the tearing out of the anchors. But, granting that to be true, a standing wall 157 feet long and 69 feet high was unquestionably a menace when open to the force of the wind blowing at the rate of 40 miles to 50 miles an hour. The inspectors and experts may not have considered the effect of such force when speaking of the safety of the wall. The record is not clear upon that point; but the mere fact that they examined the wall, and found it was not materially injured by the fire, does not relieve the insurers from the terms of the contract. In all probability the wall would have stood until the building was reconstructed had it not been for the wind which came at a critical time. Although the later agency in the work of destruction, was it the real cause of the damage? The wind was not the cause if it was an intervening agency which could reasonably have been foreseen. It could not reasonably have been foreseen if it was an improbable event, not likely to occur. Winds, such as arose December 20th, were liable to occur at any season of the year. It certainly does not conclusively appear from the evidence that such an event should not have been contemplated by the parties when they entered into the contract. It was at least a question of fact, and the finding of the trial court that the fire was the cause of the injury, is sustained."

The object and operation of the provision against hurricane, cyclone, etc., is well illustrated by the cases of *Warmcastle* v. *Scottish Union,* 50 Atl. 941, and *Beake* v. *Ins. Co.,* 143 N. Y. 402. In these cases, damage caused by the peril insured against was followed and enhanced by damage from hurricane. The policy provided that the insurer would not be liable for loss by hurricane, and the court held that in view of this provision the immediate damage resulting from hurricane could not be recovered, though proximately due to the peril insured against. From what has been said and decided, it appears clearly that the clause of the policy providing that the company shall not be liable "for loss or damage occasioned by or through hurricane" can be given operative effect without reading in the words "by fire" between the words "damage" and "occasioned." Indeed, it appears from the authorities that not only is it unnecessary to read in these words, but it would be improper so to do, for, if these words be read into the policy, the cases of *Warmcastle* v. *Scottish Union,* and *Beake* v. *Ins. Co.* have been improperly decided.

Indeed, the authorities establish that this limitation does not relate to fire caused in a certain manner, but to damage directly caused by hurricane consequent upon a fire and going to enhance the loss caused immediately by fire.

The character of the loss against which the provision of the policy is intended to limit the liability of the insurer is the same as that covered by the provision against liability for loss "by theft." It will hardly be con-

tended that this provision exempts the insurer from liability for loss by fire caused by a thief. Thieves or rioters may both cause fire, but a thief may cause a loss which, in contemplation of law, is a fire loss, without starting a fire, and it is yet to be discovered how rioters could cause such a loss without first causing a fire. As a result the provision against loss by theft is interpreted as relating to a loss by theft consequent upon a fire, not to loss by fire consequent upon a theft. This clause has been held too indefinite to have any operation, but where the rules of construction for which our opponents contend prevail, the clause relieves the company from liability for loss by theft during or subsequent to fire. See *Skencher* v. *Fire Assn.,* 60 Atl. 232.

In *Lynn, etc.* v. *Meriden, etc.,* 35 Am. St. Rep. 543, it is said:

> "In suits brought on policies of fire insurance, it is held that the intention of the defendants must have been to insure against losses where the cause insured against was a means or agency in causing the loss, even though it was entirely due to some other active, efficient cause which made use of it, or set it in motion, if the original efficient cause was not itself made a subject of separate insurance in the contract between the parties. For instance, where the negligent act of the insured, or of anybody else, causes a fire, and so causes damage, although the negligent act is the direct, proximate cause of the same, through the fire, which was the passive agency, the insurer is held liable for a loss caused by the fire; *Johnson* v. *Berkshire Ins. Co.,* 4 Allen, 388; *Walker* v. *Maitland,* 5 Barn. & Ald. 171; *Waters* v. *Merchants Louisville Ins. Co.,* 11 Pet. 213; *Peters* v. *Warren Ins. Co.,* 14 Pet. 99; *General Mut. Ins. Co.* v. *Sherwood,* 14 How. 351; *Insurance Co.* v. *Tweed,* 7 Wall. 44."

And as Cooley, in his work on Insurance, says (p. 3018):

> "The ordinary fire policy insures primarily against either all 'loss or damage by fire,' or all 'direct loss or damage by fire.'
>
> "The former of these phrases has been adopted in the standard policies of Maine, Massachusetts, Minnesota, and New Hampshire; the latter in Connecticut, Louisiana, Michigan, Missouri, New Jersey, New York, North Carolina, North Dakota, Rhode Island, South Dakota, and Wisconsin.
>
> "These phrases include not only the destruction which results from the actual combustion of the property, but, in the absence of special stipulations, cover also all damage which is the direct and natural result of a hostile fire. . . .
>
> "Injury resulting from the use of water or chemicals in extinguishing the fire is considered as a direct result of the fire, and as covered by the policy. . . .
>
> "Likewise injury resulting to goods from their removal from a burning building is within the terms of a policy of insurance against fire. . . .
>
> "A loss by theft, consequent upon the confusion attending a fire, or the removal of the goods from the building, is also considered as a direct consequence of the fire, and as covered by a policy containing no restrictions against theft."

These are the established rules of law, and whenever a provision is found in an insurance policy limiting the liability of the insurer for loss or damage arising from certain designated causes, it becomes necessary to determine to what character of loss the limitation relates, as it may be intended to refer to loss or damage due immediately to the designated cause which may, by virtue of a preceding fire, constitute a fire loss, or to loss by fire due to the cause designated. For, as the scope of the prior phrases of the policy defining the indemnity in-

clude not only the destruction which results from the actual combustion of the property, but also damage which is the proximate result of a hostile fire, and as the insurance policy is operative if the peril insured against is the immediate cause of the loss, even though a peril not insured against is the proximate cause of the loss, the question arises as to whether the limitation relates to loss due immediately to the peril specified and proximately to the peril insured against, or loss due immediately to the peril insured against but proximately to the peril specified.

This question will ordinarily be resolved by a consideration of the character of the risk as to which liability is limited. Thus, if the policy provides that the insurer shall not be liable for loss or damage by "riot," it will be construed to mean "loss or damage by fire caused by rioters," as it has been universally assumed, and is probably the fact that riot could not in the nature of things be the immediate cause of a fire loss. On the other hand, loss by theft is construed as meaning loss immediately due to theft, not loss caused by a fire caused by a thief, or resulting from a theft.

Where, however, the liability is limited so as not to include loss caused by an agency which may be either the immediate cause of a fire loss, or the immediate cause of a fire which in turn causes the loss, as in the case with hurricane and earthquake, a somewhat different question is presented. In such cases the rule of construction deducible from the authorities is this: *If the policy provides that the insurer shall not be liable for loss caused by certain specified perils, and the perils*

*specified are not included in the perils insured against, but the perils so specified might cause a loss for which it might reasonably be contended that the insurer would be liable as a peril insured against or for which the insurer would be liable, either as the immediate cause of a loss proximately caused by the peril insured against, or as the proximate cause of a loss immediately caused by the peril insured against, the limitation will be construed as relating only to losses caused immediately by the peril specified, and will not relieve the insurer from liability for losses caused immediately by the peril insured against, but proximately by the peril specified.*

In *Wausau Telephone Co.* v. *United Firemen's Ins. Co.*, 101 N. W. 1100, the Court says:

> "Each policy contained this clause in addition to the clauses of the standard policy: 'This insurance does not cover any loss or damage to property caused by electric current, whether artificial or natural.' There was no dispute as to the origin of the fire or the amount of the loss. A wire conveying an electric light current became crossed with one of the plaintiff's telephone wires at a point half a mile distant from the exchange, and the electric light current was carried into the exchange, setting fire to the insulating wrappers and the wooden frame of the switchboard, thus causing the loss by fire. . . .
>
> "The main purpose of fire insurance, at least so far as the insured is concerned, is to protect against damage resulting from fire. The standard policy which is also a statute, provides in its opening clause that the insurance company 'does insure . . . against all direct loss or damage by fire except as hereinafter provided.' . . .
>
> "If it were to be conceded that a fire resulting from an artificial current could be excepted, we should still be of the opinion that the exception should not be held to refer to the

> loss by fire. The undoubted purpose of the policy being to indemnify against loss by fire, an exception to liability for such a loss should be plainly expressed."

The cases already cited, dealing with explosion clauses lay down the same rule. Thus, in *Heffron* v. *Ins. Co.,* 20 Atl., 698, the court construed a limitation from liability for loss or damage by explosions as covering only direct damage from explosion, not loss by fire caused by explosion. In reply to the argument based on the "riot" and "civil war and commotion" cases, the Court said:

> "It cannot be urged that the excepted losses mentioned in this clause are those of fire alone. It is true that this is the case in all the sections other than the one in question, but in this one we clearly have the exception of losses by concussion merely, and losses by explosions within the premises are not out of place in connection therewith. Indeed, damage by these two instrumentalities are so quite alike that the two are very naturally associated together, and may well appear in conjunction with each other, in the midst of excepted losses by fire. Nor are losses by explosion foreign to the risks assumed by insurance against fire. They are like the damages by smoke and water, losses by theft, destruction by the falling of buildings, or injury by fire agencies without actual ignition, all of which are to be found among the losses excepted against in clauses in policies of insurance, similar to the one under consideration. Losses by explosions, as by concussions merely, which we find joined together in this policy, are thus proper subjects of exception from the general liability assumed thereby, and there is nothing which requires us to hold that more than this was intended to be covered. Each case of this character must be determined upon its own facts, and as no two policies are exactly alike, so there is like assistance to be derived from the authority of decided cases."

In *Commercial Ins. Co.* v. *Robinson,* 64 Ill. 265, the Court said (p. 267):

"The policy in this case provided that the company should not be liable 'for any loss or damage by fire caused by means of an invasion, insurrection, riot, civil commotion, or military or usurped power; . . . nor for any loss caused by the explosion of gunpowder, camphene, or any explosive substance, or explosion of any kind.' . . .

"Let us remark, in the first place, that equivocal expressions, in a policy of insurance, whereby it is sought to narrow the range of the obligations these companies profess to assume, are to be interpreted most strongly against the company. *Aurora Fire Ins. Co.* v. *Eddy,* 49 Ill. 106. The companies have the preparation of their own policies, the choice of language in which to express their obligations, and they show a studious solicitude to limit their liability. Their policies are prolix with provisions of this character, and the public must accept them or go without insurance. We have no right to censure the companies for this, and do not, but the reading of a policy furnishes a sufficient reason for the rule of interpretation formerly laid down by this court. (p. 268.) . . .

"The clause under consideration leaves out the words 'by fire.' It secures exemption from liability for losses caused by explosion, but not from liability from losses *by fire* caused by explosion. The difference in phraseology between the two clauses is so marked, that, when we consider their connection with each other, we cannot resist the conclusion that the difference was intended. (p. 269.)

"Whether the difference was intended or not, cannot be certainly ascertained, but it is reasonable to resolve the doubt against the company. The object of the company's existence is to insure against fire. That is what it holds itself out to the public as able and willing to do. . . .

"Most fires originate in acts of carelessness, and it is chiefly to guard themselves against the carelessness of others that prudent persons insure. Yet the construction of this policy contended for by the company would make the assured assume the liability for the carelessness of others.

He is thus deprived of the very protection he seeks by his insurance if, when his house burns up, he can be denied the payment of his policy because the fire was caused by an explosion upon the premises of others. The great fire of Chicago is supposed to have originated in the overturning and explosion of a lamp, but we are not aware that any of the insurance companies that suffered by that fire have sought to interpose this defense, although this clause is a very common one in insurance policies, and was probably contained in many that had been issued on the property then destroyed. . . .

"But, say the counsel for appellant, this company does not profess to insure against losses by explosion, but only by fire, and the clause, construed as we construe it, is unmeaning or at least useless. But not so. The clause was designed to apply to all cases where the explosion was the immediate cause of the loss. Suppose fire is carelessly applied to powder or other explosive substance. An explosion follows which rends furniture and building. This explosion is the result of the ignition of the explosive material, and it might be claimed that the loss caused thereby was a loss caused by fire. The courts might not so hold, independently of the clause in the policy, but we can well understand, when we examine these policies, that the insurers may have introduced this clause for the purpose of leaving no room for argument or doubt. Again, suppose a case where a fire is speedily subdued, but before it is, it has ignited powder, and an explosion has taken place which has caused much damage but has not extended the fire. In such a case, the company would claim they were protected by this clause from the liability for the consequences of the explosion."

Cases can be found placing a different construction upon the explosion clause, but it will be found on examination of these cases that the courts have founded their opinions upon the assumption that explosion could cause a fire loss only by causing a fire which should in turn cause the loss. This is the keynote of these deci-

sions, and they are not applicable here, for, as was said by Lord Halsbury, in *Quinn* v. *Leathem,* L. R. App. Cases, 1901, 495 (at p. 506):

> "There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

In *Lawrence* v. *Accidental Ins. Co.,* 7 Q. B. Div. 216,—

> "A policy of insurance against death from accidental injury contained the following condition: 'This policy insures payment only in case of injuries accidentally occurring from material and external cause operating upon the person of the insured, where such accidental injury is the direct and sole cause of death to the insured, but it does not insure in case of death arising from fits . . . or any disease whatsoever arising before or at the time or following such accidental injury, whether consequent upon such accidental injury or not, and whether causing such death directly or jointly with such accidental injury.'
>
> "The insured, while at a railway station, was seized with a fit and fell forwards off the platform across the railway, when an engine and carriages which were passing went over his body and killed him." (Syllabus.)

In this case, counsel for the insurer said (p. 218):

> "The present policy insures not against sickness, but against accident only, and the Court will consider not what was the cause of death, but what was the cause of the accidental injury. Before the present policy takes effect there must be an actual injury by accident to the insured. It is true that in *Smith* v. *Accident Insurance Co.* where the policy was in the same form as in this case, the company were held liable for death caused by erysipelas following an accidental cut received by the insured. In that case the disease supervened on the accident; here the accident actually arose from the disease."

In holding the insurer liable, Watkin Williams, J., said (221, 222):

> "It seems to me that the well known maxim of Lord Bacon, which is applicable to all departments of the law, is directly applicable in this case. Lord Bacon's language in his Maxims of the Law, Reg. 1, runs thus: 'It were infinite for the law to consider the causes of causes, and their impulsions one of another; therefore it contenteth itself with the immediate cause.' Therefore, I say, according to the true principle of law, we must look at only the immediate and proximate cause of death, and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born the accident would not have happened. The true meaning of this proviso is that if the death arose from a fit, then the company are not liable, even though accidental injury contributed to the death in the sense that they were both causes, which operated jointly in causing it. That is the meaning in my opinion of this proviso. But it is essential to that construction that it should be made out that the fit was a cause in the sense of being the proximate and immediate cause of the death, before the company are exonerated, and it is not the less so, because you can shew that another cause intervened and assisted in the causation."

As there can be absolutely no question that an earthquake consequent upon a fire can be the immediate cause of a fire loss without in any way causing a fire, and as the word is brigaded with hurricane, which we know refers to a loss consequent upon a fire, and theft, which also refers to a loss of the same character, we respectfully submit that unless something to the contrary can be found in the instrument itself, a provision in a fire policy exempting the insurer from liability for earthquake loss, or loss caused by earthquake, does not exempt the insurer from liability for loss by fire caused by earthquake.

It will probably be contended that the word "occasioned" has a broader significance than the word "caused"; that the phrase "occasioned by or through earthquake" is equivalent to "caused directly or indirectly by earthquake," and therefore covers a loss by fire caused by earthquake.

If the phrase "occasioned by or through" can be given a meaning differing from that attributable to the phrase "caused directly or indirectly," the Court will, in the interpretation of the instrument, adopt this different meaning as correctly expressing the true intent of the parties.

The general rule of interpretation is well expressed by Lord St. Leonards, in *Anderson* v. *Fitzgerald,* 4 H. L. C. 512, where he says:

> "Now, when I find that the contract uses, to express the same thing, two words which may indeed have the same meaning, but which are also open to different senses, I must be very well satisfied before I apply the same construction

to those two words, that such was the intention; for if a proper word is used, and then afterwards a word is used which admits of a different as well as of the same sense, I should come naturally to the conclusion, if there is nothing in the context to prevent it, that the intention was not to use the second word in the same sense in which the first word was used (or else why not repeat the first word?) but to use it in a different sense."

And in *Hadley* v. *Perks,* L. R. 1 Q. B. 444, 457, Blackburn, J., said:

"It has been a general rule for drawing deeds and other legal documents from the earliest times, which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning."

At the outset, it may be said that the phrase "loss occasioned by or through earthquake" would, in popular understanding, amount to no more than "loss caused by earthquake." The verbs "cause" and "occasioned" are synonyms, and are popularly so used, and it is well settled that in the construction of written instruments of the character of that under discussion, words should be construed in accordance with their popular meaning.

As said by Lord Ellenborough in *Robertson* v. *French,* 4 East. 130, 135:

"The same rule of construction which applies to all other instruments applies equally to this instrument of a policy of insurance, viz.: That it is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which term are themselves to be understood in their plain, ordinary and *popular* sense, unless they have generally, in respect of the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must, in the particular

instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some special and peculiar sense."

The words "cause" and "occasion" are synonyms and are habitually and popularly so used. Webster defines "occasion" as follows:

"To cause incidentally; to cause; to produce; to give occasion to.

"To influence; to furnish inducement for; to lead."

(See definition of "occasion" as a noun, for synonyms.)

The words "by" or "through" each have many meanings, but when used in reference to causation, they are synonyms.

Webster defines the word "by" as follows:

"Through or with; as, a city is destroyed *by* fire; to take *by* force.

The same authority defines "through" as follows:

"1. From end to end; from side to side, or from one surface or limit to another of; into at one point and out of at some other; as, to extend *through* the hallway; to go *through* a room, door, or passage.

"2. Over the whole surface or extent of; into all parts of; throughout; as, to ride *through* the country; the dye spreads *through* the liquid.

"3. During; from any point to the end of; during the entire course of; as, *through* the ages; from now *through* the rest of the year.

"4. Among; amidst; as, to walk *through* the crowd.

"5. Over all parts of (a series or succession of things); as, to go *through* a series of gymnastic exercises, lessons, etc.

"6. By means of; by the agency or help of; as, *through* his labors we now have peace."

From these definitions it appears that the term "occasioned by or through" means "caused by, or by means of," or, if we are to consider the word "occasioned" as used in a sense somewhat different from that in which the word "cause" is used, the form of expression having been varied, the phrase will then mean "caused incidentally by or by means of." Reading the phrase then as equivalent to "loss or damage caused incidentally by or by means of earthquake," the propriety of the construction here urged is emphasized as loss by earthquake consequent upon a fire is a loss caused incidentally by earthquake, but primarily and proximately by fire. As said in *Russell* v. *Ins. Co.*, 111 N. W. 406:

> "In every insurance the risk of each peril is liable to be affected by every other peril and the party at whose risk a peril is must bear the loss by such peril though it may have been indirectly and incidentally enhanced by another peril for which he is not answerable."

This statement is made by reference to damage by hurricane consequent upon a fire and shows that such damage is regarded as damage "incidentally caused by hurricane."

The word "occasion" must be considered as designating casual action, and the only real difference between "occasion" and "cause" is that the word "cause" usually connotes a design to produce the effect, whereas the

word "occasion" carries no such connotation and expresses the idea of an effect or result produced without design. Thus, it is eminently proper to speak of a loss caused by rioters, thus expressing the idea of intentional destruction, and a "loss occasioned by hurricane" thus expressing the idea of an incidental loss produced without design.

The phrase "occasioned by or through" is no more comprehensive than the phrase "caused by or arising from," a phrase of narrower significance than "caused directly or indirectly by," and which refers only to the immediate cause, not to the cause of the cause.

*Mfrs. Acc. Ins. Co.* v. *Dorgan,* 58 Fed. 945;
*Winspear* v. *Ins. Co.,* 6 Q. B. D. 42;
*Lawrence* v. *Ins. Co.,* 7 Q. B. D. 216.

In conclusion on this branch of the argument, we respectfully submit:

(*a*) That earthquake can be the immediate cause of a loss for which the insurer would be liable if the earthquake is consequent upon the fire and causes a loss on account of the conditions created by the fire.

(*b*) That the provision against liability for loss by earthquake relates to this character of loss, and that it is unnecessary to add anything to this provision of the policy in order to make it operative.

(*c*) That the policy, construed in the light of the rules of law and of interpretation, does not exempt the company from liability for the loss which has occurred.

(*d*) That if this be not so, it is at least doubtful whether or not the company intended to limit its

liability as to loss by earthquake consequent upon a fire, or as to loss by fire consequent upon an earthquake, and, under these circumstances, the policy will be interpreted in the light most favorable to the assured.

THE LIABILITY OF THE INSURER IS NOT SO LIMITED AS TO EXCLUDE A LOSS CAUSED BY FIRE ORIGINATING ON PREMISES OTHER THAN THOSE INSURED, EVEN THOUGH AN EARTHQUAKE WAS THE OCCASION OF THE FIRE AT ITS POINT OF ORIGIN.

In the foregoing argument we have endeavored to show that the provisions of the policy did not operate to exempt the insurer from liability for loss, even if the fire which caused the loss was caused by earthquake, and started upon the insured premises. In the case at bar, however, the fire originated elsewhere and spread to the insured premises. So there is here presented a further question, viz.: Assuming that a loss caused by fire originating on the insured premises is a loss for which the insurer is not liable, if the cause of the fire be an earthquake, is this also true if the fire originate elsewhere and subsequently spreads to the insured premises?

The argument in favor of the insurer on this branch of the case amounts to this: As the words "by fire" are to be read into the policy between the words "loss" and "occasioned," the company is not liable for loss caused by fires caused by earthquake. The cause of a fire is to be determined at its point of origin. Fire is a physical fact, and its causes and boundaries are physical facts and are not determined by the metaphysical lines of ownership dividing up the property consumed.

Hence, a fire originating on the property of "A," and spreading to the property of "B," and thence to "C," and so on, does not lose its character or identity, nor does its origin change as it passes from the boundary lines of the property belonging to "A" into the boundary lines of property of other persons. It is still the same fire, originating from the same cause, as long as, and wherever, it burns.

Granting the premises upon which the argument rests, it is difficult to escape the force of its logic. Indeed, the argument was approved by the United States Supreme Court in *Tweed* v. *Ins. Co.,* and *Boone* v. *Ins. Co.,* cases strongly relied upon by appellant. In a subsequent case,—that of *Schaffer* v. *R. R. Co.,* 105 U. S. 249, the Court, in commenting on the Tweed case, said: "This case went to the verge of sound doctrine," and the Federal decision in the Boone case was not followed in either Virginia or Connecticut.

In cases of tort, the courts of the various States are divided in opinion as to the liability for damage done by the spread of fire caused by negligence or design. Persons causing fire by negligence are always held liable for the damage done by the fire to the owner of the property upon which it started. When the fire spreads over lands owned by neighboring proprietors, the question is regarded by some courts as assuming a different aspect. The courts of some states hold that, as a matter of law, the person liable for causing a fire is liable for all damage done by the fire, no matter how far it spreads. These courts hold the cause of the fire on the land where it started is, as matter of law, the proximate

cause of all injury done by the fire. Other courts take a contrary view, and hold that the act causing the fire is the proximate cause of the injury done by the fire only to property situated on the land belonging to the person on whose land the fire started. These courts hold that, in so far as adjoining proprietors are concerned, the fire existing on the land of their neighbors—not the act which caused it to exist—is the proximate cause of the damage.

Other courts treat the entire matter as a question of fact for the jury, viz.: As a question of fact, was the resulting damage the natural and probable consequence of the act causing the fire?

In our opinion, the consideration of these cases in tort injects a false quantity into the present discussion. We are here dealing with the interpretation of a contract, and are seeking to arrive at the expressed, or necessarily implied, intention of the parties, and it is reasonably clear that cases of tort cannot render any material assistance. Nor, in our opinion, is either the Boone case or the Tweed case in point, for the clause in the policies under discussion in those cases provided that the companies should not be liable "for loss by fire which may happen or take place by means of invasion, etc." In these cases, the court treated the contract as absolutely complete, supplied nothing by interpretation, and merely held that a fire taking place on the lands of A by reason of a specific cause also takes place on the adjoining land of B by reason of the same cause, if there be no intervening act sufficient to be viewed as a cause of fire. But in these cases the

court construed the language of the policy just exactly as it found it; it did not add a syllable to detract an iota from the force of the language of the policy. Here, however, we are to add to the policy the words "by fire." This is to be done to supply an ellipsis. But why should these words be added without any qualification, conceding that they must be added? The insurance policy only covers the property insured while located and contained as described in the policy, and not elsewhere. The policy contains restriction after restriction relative to the doing of acts upon the premises in which the insured property is located and contained, and if a fire arises from any of these acts, the insurer is not liable.

On the other hand, the insurer is liable for fires originating on adjoining premises and spreading to the premises insured, even if the fires are occasioned by acts which would have vitiated the policy if committed on the insured premises. In other words, the insurer requires the insured to keep his premises in such shape that fire will not be likely to originate thereon from certain causes, yet, as the insured is not his neighbor's keeper, and, as the object of insurance is to protect against the carelessness of neighbors, which cannot be regulated or controlled, the insurer is liable regardless of the cause of the fire on the neighboring premises. In the business of insurance, location and ownership are the dominant factors of the risk. Liability is assumed only while the property is owned, located and contained as described in the policy. Thus, in the policy of insurance, locality and ownership play a part not

known or recognized in the law of tort. So, in supplying an ellipsis in the policy in accordance with the prior provisions, we should look not only to the language defining the peril insured against, but also to the fundamental features of the risk and warranties on the part of the assured. From this general view of the policy it appears:

(*a*) That the insurer assumes liability for direct loss or damage by fire to the property insured; only

(*b*) While owned, located and contained as described in the policy.

(*c*) That the assured has agreed not to do certain acts upon the premises in which the property is located and contained which will be likely to cause fire or create conditions favorable to fire.

(*d*) That the insured will not be liable for loss or damage . . . occasioned by or through earthquake.

Obviously the words "by fire" are not alone sufficient to fill the ellipsis, for, though broadly speaking, the policy runs against damage by fire as a matter of fact, it only runs against damage by fire to the property insured while located and contained as described in the policy. So, if we merely read in the words "by fire" we would make the limitation broader than the risk. We must, therefore, upon the very same principles upon which the words "by fire" are read into the policy, also read in the phrase "to the insured property while located and contained as described in this policy." After this phrase is read in, we read in the words "by fire." But is this all? Should not the words "originating on the premises" be also read in after the

words "by fire"? In other words, should not the clause read: *"This company shall not be liable for loss or damage to the insured property while located and contained as described in this policy, by fire originating on the premises occasioned by or through earthquake"?*

There is absolutely no reason whatsoever why the ellipsis should be supplied in such a manner as to exempt the company from liability for fire caused by earthquake upon premises other than those described in the policy, and absolutely no authority for such a proceeding. Indeed, all authority is to the contrary.

It cannot be seriously contended that the insured, on reading the policy, would have understood that a fire caused by earthquake several blocks distant from his premises, which subsequently spread to and destroyed his premises, was intended to be excluded from the risk. The policy contains no words to which this meaning is to be attributed, but we are to supply an ellipsis. Conceding that the ellipsis exists; conceding that the insured should have known of its existence; conceding that the ellipsis should be filled in so as to limit the liability assumed by the insurer, still, it must also be conceded that the ellipsis must not be filled in in such a way as to limit the insurer to an extent not contemplated by the insured, and of which the language of the policy was not sufficient to apprise him.

In construing a policy identical with that under discussion, Judge Seawell, one of the ablest judges of the Superior Court of this State, after remarking that earthquakes were unlikely to cause fires in buildings strongly constructed and properly wired, and that the

risk of fire originating on the premises by reason of earthquake could be reduced to a minimum, if not entirely prevented, said:

> "The primary fires may have been due to unskillful or defective wiring or to the improper construction of the buildings in which they were installed, or both. It was known to the parties, when they entered into the contract, that the defendant was to be liable for a loss of which fire and not earthquake was the proximate cause. It is unreasonable to hold that, in accepting the policy, plaintiff should have understood that he assumed the consequences of the negligence of other persons, over whom he had no control, at points far distant from the insured property; or that, in case of loss, it would be incumbent upon him to investigate all of the other fires which occurred at the same time."
>
> *Baker & Hamilton* v. *Williamsburgh City etc. Co.,* San Francisco Superior Court No. 1284.

In the case of *Com. Ins. Co.* v. *Robinson,* 64 Ill. 265, heretofore quoted, the Supreme Court of Illinois declined to interpolate the words "by fire" in a clause providing that the insurer should not be liable "for loss or damage by explosion," for the reason that such an interpolation would result in freeing the insurer from liability for loss by fire caused by explosion on premises other than those insured, and subsequently spreading to the insured premises, a result not contemplated by any of the parties.

The Court, in the case just mentioned, said:

> "He (the insured) would have no reason to suppose that among the voluminous stipulations of the policy, there would be found one intended to deprive him of its benefit because a fire, which has destroyed his property, originated in another house a half mile distant, in the explosion of a

camphene lamp. Most fires originate in acts of carelessness, and it is chiefly to guard themselves against the carelessness of others that prudent persons insure. Yet the construction of this policy contended for by the company would make the assured assume the liability for the carelessness of others. He is thus deprived of the very protection he seeks by his insurance if, when his house burns up, he can be denied the payment of his policy because the fire was caused by an explosion upon the premises of others. The great fire of Chicago is supposed to have originated in the overturning and explosion of a lamp, but we are not aware that any of the insurance companies that suffered by that fire have sought to interpose this defense, although this clause is a very common one in insurance policies, and was probably contained in many that had been issued on the property then destroyed.

"Counsel for the company, feeling the unreasonable character of this condition, with their interpretation, in cases where the fire comes from an explosion on other premises, speak of it as if it referred only to explosions on the premises of the assured. But the policy will bear no such construction or limitation. We must either hold that the clause refers to loss by explosions simply, without reference to fire, or to losses by fire caused by explosion anywhere, whether on or remote from the premises. There is no middle term. It must receive one of these constructions or the other. One is consistent with the context, reasonable in itself, and just to both parties. The other requires the interpolation of two additional words in the policy, is inconsistent with the context, and, in a large degree, would make fire insurance a mere mockery. We cannot hesitate which construction to choose."

In the case of *Baker & Hamilton* v. *Williamsburgh City Fire Ins. Co.*, 157 Fed. 280, Judge Whitson, in construing a policy identical in form with that under consideration, said (p. 284):

"But for the fact that the policy has provided for a different liability as regards earthquake-caused fires than for

those originating through causes specified in the clause immediately preceding that relating to earthquakes, the case of *Ætna Ins. Co.* v. *Boone,* 95 U. S. 117, 24 L. Ed. 395, would perhaps control the result here; for, in that case it was held that a fire originating in one building and communicated through other buildings to the one insured was to be attributed to the original fire as the proximate cause, and the defendant was held not liable, the proximate cause being defined as the efficient cause. To the same effect are many cases cited by counsel. But the ground upon which I expressly place my decision is that the policy has, by its own limitations fixed a more extended liability than is now contended for, and this is to be drawn from the context, the classification of hazards and the phraseology by which they have been excepted; for, if the conclusion be correct that the numerous exigencies which may arise as incidental to an earthquake were not intended to be included as giving exemption, then there is no other way to harmonize the language which has been used in such a manner as to give effect to all the provisions of the policy. Regarding the earthquake clause the policy must therefore be considered as inviting a construction which is inconsistent with the extent of defendant's claim of non-liability."

In this connection we desire to call to the attention of the Court a comment on the Tweed case contained in Wood on Fire Insurance. This Court will recall that one of the differences between this case and the Tweed case is the fact that in the Tweed case the policy declared "that this corporation (the insurer) shall not be liable to make good any loss or damage *by fire* which shall happen or take place by means of explosion." Whereas, in the case at bar, the words "by fire" are omitted from the proviso.

In commenting on the Tweed case, Mr. Wood erroneously assumed that the policy there under con-

sideration was similar to that at bar, and that the proviso omitted the words *"by fire."* His criticism on the Tweed case is inaccurate, on account of the error in his premises, but this very error has resulted in giving us his opinion on a case similar to that at bar. He says:

> "The policy contained a stipulation, among other things exempting the insurer from 'any loss or damage that may happen by means of any . . . explosion . . .' An explosion occurred in a warehouse directly across the street, some fifty feet distant, which threw down the walls of the warehouse in which the explosion occurred, and scattered the cotton and other combustible materials in the street, and an extensive conflagration ensued, in which the plaintiff's warehouse was consumed. The fire was not communicated directly to it from the building in which the explosion occurred, but, from another building fired by the explosion. The court held that, *if the fire happened or took place by means of the explosion,* the insurers were not liable; and to ascertain that fact it was important to ascertain *whether any new cause had intervened between the explosion and the fire that consumed the warehouse, that was of* itself sufficient to stand as the cause of the misfortune. The fact that the fire did not reach the plaintiff's warehouse directly from the building fired by the explosion, or that the wind carried the flames there, supplied no new force sufficient to stand as the *cause* of the burning and the loss must therefore be attributed to the explosion as the proximate cause. But it is believed that the doctrine of this case is really untenable, and not fairly within the spirit or intention of the policy or the parties thereto. It is evident that the exemption was only intended or expected to apply to cases of an explosion in the building itself, and not to fire occurring by reason of explosions elsewhere. Again, applying the rule advanced in the case, a whole city might be consumed, and yet the insurers who had taken the precaution to insert such clauses in their policies, would escape liability in case the fire originated from an explosion, unless some *extraordinary cause* intervened that, in the language of the Court,

'would stand for a new cause.' This rule is very proper as applied to the building in which the explosion occurred, but to apply it to other buildings consumed by reason of the ignition of buildings standing apart therefrom, is not only contrary to the evident intent of the parties and a fair construction of the instrument, but is also unjust, unreasonable and unwarranted, and is in defiance of the rule that exemptions in a policy of insurance will be construed according to the evident intention of the parties, and most favorably for the assured. The better doctrine is, that exemptions in a policy, as well as conditions, will be strictly construed, and will not be operative to protect the insurer, unless the case is brought strictly within the *letter* of the exemption."

Wood on Fire Ins., 2d Ed., Vol. 1, pp. 257, 258.

From the authorities quoted it appears that the language used in the policy is not sufficient to apprise skilled lawyers of the fact that it was intended to so limit the indemnity as to exclude losses such as that at bar. Now, conceding there is an ellipsis and that the words must be supplied, obviously the words supplied must not be such as to limit the liability to an extent not contemplated by the insured or even by a skilful lawyer passing on the question after full argument. If the ellipsis be supplied by inserting the words (in italics) "The company will not be liable for loss or damage *to the insured property while located and contained as described in this policy by fire originating on the premises* occasioned by or through earthquake," the clause will be given an operation which will limit the liability of the insurer as to fires caused by earthquake, and the rules for the interpretation of written instruments do not authorize the Court to go further than is necessary to accomplish this result.

In *Wallace* v. *Ins. Co.*, 41 Fed. 742, the Court said (p. 744):

> "If the language employed in the policy leaves the question in doubt, the construction placed upon it, and acted upon by the assured, is to be upheld. A contract drawn by one party, who makes his own terms and imposes his own conditions, will not be tolerated as a snare to the unwary; and if the words employed, of themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured. As the insurance company prepares the contract, and embodies in it such conditions as it deems proper, it is in duty bound to use language so plain and clear that the insured cannot mistake or be misled as to the burdens and duties thereby imposed upon him. Wood, Ins., Sec. 140, 141, and cases cited."

So, even conceding that the insurer might have intended a still further limitation upon his liability, the intent of the insurer is not the determinative. If the ellipsis can be supplied in a sensible manner, and in a way favorable to the assured, a broader exemption will not be given.

In conclusion on this branch of argument, we respectfully submit:

(1) That the words of the policy under consideration do not declare that the insurer shall not be liable for loss by fire caused by earthquake.

(2) That the words used in the policy do not evidence an intent that the insurer shall not be liable for loss by fire caused by earthquake.

(3) That in order to exonerate the company from liability for loss by fire caused by earthquake, it is necessary to read something into the policy.

(4) That the Court is not at liberty to read into the contract any words limiting the liability expressly assumed by the insurer unless the language of the contract is such as to show

(*a*) That both parties understood the words used as expressing something actually omitted.

(*b*) That the words used showed that the minds of the parties met on the subject-matter of the omission, and indicated what the subject-matter was.

(5) That the Court is not at liberty to read anything into this policy because

(*a*) The policy is so drawn that the insured would not, upon reading it, be conscious of the fact that any omission existed.

(*b*) That no omission does in fact exist, and operative effect can be given to all the words used without reading a syllable into the contract.

(6) That there is no evidence of the existence of any contract but the policy itself, which is not only the evidence of the contract, but the contract itself, and there is no reason for saying that the policy should be read as excluding liability for loss by fire occasioned by earthquake at a point remote from the insured premises, rather than as excluding loss by fire originating on the insured premises and caused by earthquake.

In this policy the insurer has declared that it will not be liable for loss or damage occasioned by or through earthquake. Such provisions have been held to apply only to cases in which the cause mentioned is

the immediate cause of the loss, and such is the ordinary meaning of the language.

*Winspear* v. *Ins. Co.*, 6 Q. B. D. 42;
*Lawrence* v. *Ins. Co.*, 7 Q. B. D. 216;
*Mfrs. Acc. Ins. Co.* v. *Dorgan*, 58 Fed. 954;
*Commer. Ins. Co.* v. *Robinson*, 64 Ill. 265;
*Heffron* v. *Ins. Co.*, 20 Atl. 698.

In the case of *Scheffer* v. *R. R. Co.*, 105 U. S. 249, the U. S. Supreme Court, in commenting on the Tweed case, said (p. 251):

> "An explosion took place in the Marshall Warehouse, which threw down the walls of the Alabama Warehouse—the one insured, *situated across the street from the Marshall Warehouse*—and by this means, and by the sparks from the Eagle Mill, also fired by the explosion, facilitated by the direction of the wind, the Alabama Warehouse was burned. This Court held that the explosion was the proximate cause of the loss of the Alabama Warehouse because the fire extended *at once* from the Marshall Warehouse, where the explosion occurred. The Court said that no new or intervening cause occurred between the explosion and the burning of the Alabama Warehouse; that if a new force or power had intervened sufficient of itself to stand as the cause of the misfortune, the other must be considered as too remote. This case went to the verge of the sound doctrine in holding the explosion to be the proximate cause of the loss of the Alabama Warehouse."

In the Tweed case the Court was construing a policy which provided expressly against liability for any loss by fire which might happen or take place by certain means where as in this case, the words "by fire" are omitted from the policy. If the Tweed case went to

the verge of sound doctrine a decision in the case at bar in favor of the insurer would go beyond the verge of sound doctrine.

### SECTION 2628, CIVIL CODE, IS INAPPLICABLE TO THE CASE AT BAR.

Title X of the Civil Code relates generally to contracts of insurance and Article IX of that Title relates to "loss." The article is not one peculiarly applicable to fire insurance, but relates to insurance in general.

Section 2626 provides:

> "An insurer is liable for a loss of which a peril insured against was the proximate cause; although a peril not contemplated by the contract may have been a remote cause of the loss; but he is not liable for a loss of which the peril insured against was only a remote cause."

Section 2628 provides:

> "When a peril is specially excepted in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted."

Section 2626 is, as we have seen, declaratory of the general rule and is applicable to a policy such as that at bar.

It is contended by the insurer that Section 2628, Civil Code, is applicable to the case at bar. That the peril of earthquake is a peril *specially excepted* from this contract of insurance. That earthquake was the proximate cause of the loss for which plaintiff seeks indemnity, even though fire (the peril insured against) was

the immediate cause of the loss. That as a result of the rule of law declared by this section, the insurer is relieved of all liability.

It is obvious that this section is inapplicable to the case at bar, unless

1. Earthquake is a peril excepted from the policy under consideration, and also

2. Specially excepted.

As a matter of fact, neither of these conditions exists. The peril of earthquake is not a peril excepted in the policy, but even if it could be so considered, it is not a peril specially excepted.

The sole peril insured against by this policy is damage by fire. *St. John* v. *Ins. Co.,* 11 N. Y. 516. The policy (without any reference to exceptions) contains no words in reliance on which it could be plausibly contended that damage by earthquake was covered thereby, and, as we have seen, damage immediately caused by earthquake can only be recovered if it be also damage by fire, and this because fire, not earthquake, is the sole peril insured against.

As fire is the sole peril insured against, earthquake cannot, in the nature of things, be a peril excepted, for, by definition, "An exception takes out of the operation of an engagement or enactment something which would otherwise be part of the subject-matter of it." Bouvier's Law. Dictionary—"Exception."

As the peril of earthquake is not a peril insured against in the provisions of the policy defining the risk, no subsequent provision can make the peril of earth-

quake an exception. It must remain as it is,—a peril not insured against. A subsequent clause declaring that the insurer shall not be liable for loss occasioned by earthquake may be given an operation, so that it will be construed as a proviso limiting the liability of insured as to loss by fire, the peril insured against. But this does not make earthquake an excepted peril. It is merely a proviso limiting the scope of the risk assumed for damage occasioned by the peril insured against.

In *Acker* v. *Richards,* 63 App. Div. (N. Y.) 305; 71 N. Y. Supp. 929, the Court (p. 931) said:

> "An exception exempts something absolutely from the operation of a statute by express words in the enacting clause; a proviso defeats its operation conditionally."

In *Rowell* v. *Janvrin,* 151 N. Y. 60, the Court (p. 68) said:

> "An exception is, generally, part of the enactment itself, absolutely excluding from its operation some subject or thing that otherwise would fall within its scope."

The question of the character of the general provisions found in insurance polices relative to invasion, riot, etc., as constituting provisos or exceptions is fully discussed in the case of *Western Assur. Co.* v. *Mohlman,* 83 Fed. 811; 23 C. C. A. 137. In that case Judge Lacombe, speaking for the Court of Appeals (Justice Peckham and Judge Shipman) said (p. 815):

> "A clause to the effect that the insurer should not be answerable for loss by fire which should happen by any explosion is referred to in two cases cited by defendant (*Hayward* v. *Ins. Co.,* 7 Bosw. 385, 2 Abb. Dec. 349, and

*St. John* v. *Insurance Co.*, 1 Duer, 371; 11 N. Y. 516) as 'an exception to the general language of the previous clause, by which they promise to make good such loss or damage as shall be occasioned by fire.' But the point here raised was not before the court. It was conceded in both cases that the fire was the result of an explosion, and the word 'exception' is used in the opinions, evidently, not in its technical sense, as contrasted with 'conditions,' but as a convenient way of expressing the fact that the insured under such a policy would not be liable for all losses by fire. This seems clearly indicated by the sentence from 11 N. Y. 518:

" 'Hence a loss occasioned by invasion, insurrection, riot, and the like has usually been found excepted in such policies; and although in this, and perhaps in policies generally, the exception in this respect is in terms of losses by fire, the clause would be equally definite and intelligible if those words were omitted in the clause stating the exception.'

"The academic distinction between an exception and a proviso is thus stated in Bouvier's Law Dictionary:

" 'An exception exempts absolutely from the operation of an engagement or an enactment; a proviso defeats their operation conditionally. An exception takes out of an engagement or enactment something which would otherwise be part of the subject-matter of it; a proviso avoids them by way of defeasance or excuse.' . . .

"A pertinent case cited on the brief of plaintiff in error is *Sohier* v. *Insurance Co.*, 11 Allen, 336. The policy in that case insured Sohier, in the language of the opinion:

" 'Against loss or damage by fire to the amount of $2,500 *on his brick and slate building known as the "National Theater," situate on Portland Street, Boston, Mass. This policy not to cover any loss or damage by fire which may originate in the theatre proper.*'

"Some provisos against liability for loss by fire which happens by invasion, riot, and the like, are in a later part of the policy. The clause in italics is written in the policy, the rest of the parts quoted being printed.

"The opinion proceeds (the italics infra being our own):

" 'The first question raised by the bill of exceptions is whether the burden of proof was on the plaintiff to show a

loss by fire which did not originate in the theatre proper. This depends upon the construction given to the clause, "This policy not to cover any loss, or damage by fire which may originate in the theatre proper." If that clause can be regarded as a *proviso*,—that is, *a stipulation added to the principal contract, to avoid the defendant's promise by way of defeasance or excuse*,—then it is for the defendants to plead it in defense, and support it by evidence, but if, on the other hand, an exception, so that the promise is only to perform what remains after the part excepted is taken away, then the plaintiff must negative the exception to establish a cause of action. It is not always easy to determine to which class—whether of provisos or exceptions—a particular stipulation belongs; and *this one is certainly very near the line*. But, after careful consideration, the court are of the opinion that this was an exception to the subject of the contract, and that it put the burden of proof on the plaintiff. The qualification of the contract to which the parties agreed is not inserted with any technical formality or precision. But *it is found between the statement of what is insured and the promise to pay in case of loss, in close connection with, and qualification of, the description of the subject-matter* of the insurance. The provisos are set forth in a different part of the instrument. It thus seems to be a direct limitation of the risk against which insurance is effected. The difference would only be a formal one if, instead of the phraseology actually used, the language of the policy had been, "do insure against loss or damage by fire not originating in the theatre proper." It would illustrate the operation of the phrase in question, and show its effect as an exception, if we suppose it applied to the building insured. If the clause in the policy had been, "This policy not to cover any loss or damage by fire to the part of the building used as a theatre proper." . . . this would manifestly have been an exception from the subject-matter of the insurance. And it is in like manner an exception to the risk taken by defendants, *when, in the same part of the policy in which they insure the risk of fire, and in the same connection*, they state, in substance, that it is only fire which does not originate in the theatre proper against which they insure.' . . .

"Examined in the light of these authorities, the clause providing what shall happen in the event of a fall is not difficult of construction. *It is not in that part of the policy which insures the risk, nor 'in close connection with and qualification of the description of the subject-matter of the insurance,'* but is placed with the other provisos in a different part of the instrument. The mere location of the clause is, of course, not controlling, but it has been considered as of some weight in several of the cases cited *supra.* Nor is it to be construed as if it were removed from its position among the provisos, and incorporated with the clause descriptive of the subject-matter by the mere use of the words 'except as hereinafter provided.' To give these words such an effect would be to incorporate with the descriptive clause all the provisos as to loss caused directly or indirectly by riot or invasion, or by neglect of the insured, or by explosion or lightning, or where there has been other insurance (not notified to company) or where manufacturing is carried on after 10 P. M., or the building stands vacant, etc. The overwhelming weight of authority, as will be seen from the citations *supra,* is opposed to any such construction."

To summarize:

(1) An exception takes out of the operation of an engagement something that would otherwise be part of it. The policy of insurance in the case at bar insures against the peril of fire alone; the peril of earthquake not being a peril covered by any words of the contract, cannot be a peril excepted from the contract. That which has never been included cannot be excepted. Of course, this does not mean that the insurer cannot limit the risk assumed so as to exclude loss by fire consequent upon earthquake, or loss by earthquake consequent upon fire. This question is not in any way affected by the code section.

But the insurer cannot escape liability for loss by fire arising from various causes not insured against, by inserting in the provisions of the policy a declaration that the insurer is not liable for loss occasioned by a number of causes not insured against and mentioned as such.

Nor would the code section apply where the policy construed so as to except "loss by fire caused by earthquake," for this would be a mere limitation on the liability of the insurer for damage done by the peril insured against, arising from a particular cause. Where there is but a single peril insured against, the section has no application, for it applies only to perils excepted, not to limitations on liability on account of the origin of the peril insured against.

Under any circumstances, the provision as to loss occasioned by earthquake is inserted by way of proviso, not by way of exception. But the code section does not exonerate the insurer from liability due immediately to a peril insured against merely because the proximate cause of the loss was a peril excepted. To have this effect, the peril must be *"specially excepted."* The word "specially" means "in an especial manner," and in construing the code section, the meaning and effect of this word should not be disregarded.

In view of the fact that exceptions are distinguished from provisos in accordance with their location in the instrument under consideration, and in view of the fact that it was undoubtedly the intention of the Legislature to require that an exception of the class mentioned in Sec. 2628 should be inserted in such a manner as to

naturally attract the attention of the insured. It is but fair to construe the statute as requiring that the exception be inserted in the clause defining the risk.

The object of the code provision was to place certain perils excepted in the same class as perils separately insured against. Its effect was, however, limited to perils specially excepted. That is, perils excepted and designated as excepted in the insuring clause. The section has no application to policies insuring only against a single peril, such as fire, nor does it apply to provisos, or even exceptions, printed in fine type in the body of the policy and widely separated from the clauses defining the risk.

Throughout this brief, we have not discussed the question of proximate or remote cause, but have considered only the question of the proper interpretation of the contract of insurance. We believe it to be immaterial whether or not the earthquake is to be viewed as the proximate cause of the loss, or merely as the cause of the fire, which was the cause of the loss,—that is, as the cause of the cause. In our opinion, the parties did not intend to exclude from the indemnity losses of the character of that at bar, and the policy of insurance contains no language to which this effect must be attributed, for, whether the loss at bar be considered as proximately or remotely caused by earthquake, it was not caused immediately by earthquake, and only losses caused immediately by earthquake are excluded from the indemnity.

In closing, it may not be amiss to allude to some decisions in insurance cases relative to the question of proxi-

mate cause, and to point out a distinction existing between proximate cause in the law of tort and proximate cause in the law of contract.

The law of tort deals with responsibility imposed by law (irrespective of contract) for the consequences of human action; the law of insurance deals with contracts for indemnity against losses caused by the elements. This gives rise to a difference which was pointed out by Mr. Cardozo, one of the most able specialists in the law of insurance, in his brief in the case of *Hustace* v. *Insurance Co.*, 175 N. Y. 292, where he said:

> "The same event may be a proximate or a remote cause, according as the average mind, having regard to the nature of the litigation, would treat it as the one or the other. An illustration may make this clear. Take the case of *Lowery* v. *The Manhattan Ry. Co.*, 99 N. Y. 153. A live coal, from the elevated railroad, falling, struck and frightened a horse. The horse ran away and injured a pedestrian. In an action against the Elevated Railroad Company for damages, it was held that the negligence of the defendant in dropping the coal was the proximate cause of the damage. Clearly that decision was sound. *But suppose that the injured pedestrian had held a policy of accident insurance, covering injury by runaway horses, but excepting injury from every other cause. Would it not be held for the purpose of such an action, that the live coal was only the remote and the runaway horse the proximate cause?*
>
> Now, what is the basis of the distinction? The same act which in the one case (tort) was treated as the proximate cause of the accident is, for the purpose of another case (insurance) involving the same accident, treated as the remote cause. Why should that be so? Why is the same event to be treated as a proximate or a remote cause according to the nature of the action in which the question arises? We can only fall back again upon the test of the understanding

or contemplation of the average man. *Where the question is one of liability in damages for a tort—a question of responsibility, of guilt, of authorship—the average mind looks back of mechanical instruments to the human agent, who by action or inaction set the dangerous forces in activity. It looks back of the runaway horse, to the coal dropped through the negligence or misconduct of a responsible being. On the other hand, where the mind is concentrated upon the physical or mechanical cause, and not upon the guilty or responsible cause, it stops when it reaches the runaway horse, and ignores the nature of the ultimate event which was the origin of the mishap. The same event which is treated as the proximate cause in one case is treated as the remote cause in the other."*

This statement is perfectly correct. There can be no doubt that the act of an individual setting fire to a building in which a powder magazine was situate must in the law of tort be regarded as the proximate cause of a loss done to neighboring property by the explosion of the powder.

On the other hand, it is settled that where a building in which there is situate a powder magazine, takes fire, and in consequence of the fire the magazine explodes, damaging adjoining properties, such damage cannot be recovered on policies protecting the owners of the property against loss or damage caused by fire. This is true if the policy contains no provision relating to explosion. This rule was laid down in the Erith Explosion Case, 19 C. B. (N. S.) 126. In that case, Willes, J., said (p. 132):

"We are bound to look to the immediate cause of the loss or damage, and not to some remote or speculative cause. Speaking of this injury, no person would say that it was oc-

casioned by fire. It was occasioned by a concussion or disturbance of the air caused by fire elsewhere. It would be going into the causes of causes to say that this was an injury caused by fire to the property insured. The rule *'In jure non remota causa, sed proxima spectatur,'* determines this case."

See also *Winspear* v. *Ins. Co., supra; Lawrence* v. *Ins. Co., supra.*

In these cases the insured, while in a fit, fell into the water and was drowned, the fit causing the fall. The court held the fall, not the fit which caused it, was the proximate cause of death. In *Mfrs. Acc. Ins. Co.* v. *Dorgan,* 58 Fed. 946, 954, the Court of Appeals said (p. 954):

"We are of the opinion that in the legal sense, and within the meaning of the last clause, if the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause."

And, referring to the Winspear and Lawrence cases, above cited, the court said (p. 955):

"These cases are referred to with approval by Mr. Justice Gray in delivering the opinion of the supreme court in case of *Insurance Co.* v. *Crandal,* 120 U. S., 527-532, 7 Sup. Ct. 685. They sufficiently establish the proposition that, if the deceased in this case died by drowning, then drowning was in law the sole and proximate cause of the disability or death."

Paraphrased and applied to the case at bar the opinion of Willes, J., in the Erith Explosion Case would read as follows: "We are bound to look at the immediate cause of the loss or damage; not to some remote or speculative cause. Speaking of this injury no person would say that it was occasioned by earthquake. It was occasioned by fire caused by another fire elsewhere, which fire was caused by earthquake. It would be going into the causes of causes to say that this injury was caused by earthquake to the property insured. The rule *'In jure non remota causa, sed proxima spectatur'* determines this case."

We respectfully submit that the judgment of the lower court is free from error and should not be disturbed.

Respectfully submitted,

CHARLES S. WHEELER,

J. F. BOWIE,

*Amici Curiæ.*